

State Tax Alert October 2022

State Sales and Use Tax Quarterly Update - October 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.

States hedge on digital advertising services taxation - may seek to expand existing sales and use tax laws.

It is often said that the world of state taxation is a "copycat league," and that once one state taxing authority decides to turn a specific issue into a point of emphasis, others will soon follow suit. In 2020, the Maryland legislature introduced a bill that would impose a new tax on revenues derived from the provision of digital advertising services (the "DAT"). That bill, which ultimately was enacted over Governor Larry Hogan's veto in 2021, and which took effect on January 1, 2022, currently is the subject of two separate lawsuits challenging its validity under Maryland law and the U.S. Constitution. Nevertheless, the DAT is currently in effect and taxpayers are required to file quarterly returns and make estimated tax payments.¹

While a number of states almost immediately introduced similar legislation, to date none have enacted a new tax on digital advertising services. However, one state - New Mexico - recently issued a "clarification," announcing that receipts from the sale of advertising services to advertisers within and outside New Mexico are, and have always been, subject to the state's gross receipts tax (GRT). On August 9, 2022, the New Mexico Taxation and Revenue Department (Department) issued [proposed regulations](#) explaining that the tax applies to providers of digital advertising services whose digital platform may be accessed or viewed from within New Mexico. Notably, the regulations specifically state that the GRT levied on those advertising receipts "does not impose an unconstitutional burden on interstate commerce." If approved, the regulations will be effective after publication in the New Mexico Register or later.²

As a number of interested parties have noted in comments to the Department, the "clarifying" regulations pose some significant compliance challenges; specifically with regard to sourcing.³

¹ For more information on the Maryland Digital Advertising Services Tax, see EY Tax Alert [2021-2053](#) (December 15, 2021).

² For more information on this development, see EY Tax Alert [2022-1222](#) (August 12, 2022).

³ See *NM's Proposed Digital Ad Regs Burdensome, Biz Group Says*, 2022 Law360 252-101 (September 9, 2022).

Similar sourcing issues have created a great deal of uncertainty in applying the Maryland DAT, and regulations issued there in late-2021 have not addressed many of the common scenarios related to determining the tax. As such, taxpayers that derive income from providing digital advertising services have struggled to determine the appropriate revenue streams and relevant data points that will inform their DAT sourcing determinations. It is hoped that, going forward, both Maryland and the other states seeking to tap into this new revenue stream will provide greater and more explicit guidance to ease the already high compliance burden on taxpayers.

Our Observation: Regardless of the outcome of the legal challenges to Maryland's DAT, the New Mexico Department's action in issuing "clarification" that the state's sales and use tax applies to digital advertising services demonstrates that - one way or another - such revenue streams will likely be subject to some form of transaction or gross receipts tax in a number of states. Apart from working with the various trade organizations monitoring the issue to advocate for sensible and comprehensive guidance, potentially affected taxpayers should start the process of reviewing their internal systems to understand whether they derive any such revenue and to what data they have access in order to simplify the sourcing process.

Other Recent Sales and Use Tax Developments

Nexus

Minnesota: The Minnesota Department of Revenue (MN DOR) announced that the temporary nexus relief provided in response to the COVID-19 pandemic ended on June 30, 2022. During the temporary relief period (March 13, 2020 – June 30, 2022), the MN DOR did not seek to establish sales and use tax nexus due to the in-state presence of an employee temporarily telecommuting due to the pandemic. Minn. Dept. of Rev., "[Our Response to COVID-19: COVID-19 and Telecommuters](#)" (last updated June 6, 2022).

Pennsylvania: An out-of-state business that sells merchandise through an online marketplace's fulfillment program, and whose only connection to Pennsylvania is the storage of its inventory at the online marketplace's in-state warehouse, is not required to collect and remit Pennsylvania sale tax on such sales because it does not have sufficient contacts with Pennsylvania. Merchants participating in the fulfillment program submit a list of inventory to the online marketplace who then designates the location to which it is shipped, unless the merchant pays a fee enabling it to direct the initial shipment of inventory to certain locations. The merchant has no control over inventory once it is received by the online marketplace. The online marketplace facilitates and fulfills sales of the merchant's inventory, collects payment from the customer and ships the merchandise from its warehouses. The identity and location of the purchaser is not disclosed to the merchant. Given these facts, the Pennsylvania Commonwealth Court said "[w]e are hard pressed to envision how, in this circumstances, a [merchant] has placed its merchandise in the stream of commerce with the expectation that it would be purchased by a customer located in the Commonwealth, or has availed itself of the

Commonwealth's protections, opportunities, and services." The court also held that the Pennsylvania Department of Revenue's authority to examine a taxpayer's records under Pa. Tax Code §272 cannot be used to demand business information against out-of-state merchants participating in the fulfillment program. [Online Merchants Guild v. Hassell](#), No. 179 M.D. 2021 (Pa. Commw. Ct. September 9, 2022).

Tax Base and Taxability

Indiana: New law ([SB 2](#)) exempts sales of children's diapers (disposable or reusable) from the state's gross retail tax, effective for retail transactions occurring on or after Sept. 1, 2022. A transaction is considered to have occurred before Sept. 1, 2022 if an agreement to the transaction is entered into and payment for the property is made before that date. The law also provides that from Sept. 1, 2022 through June 30, 2023, the gasoline use tax rate is the lesser of (1) the monthly gasoline use tax rate per gallon of gasoline as determined by the revenue department or (2) \$0.295 per gallon of gasoline. The gasoline use tax cap provision expires July 1, 2023. Ind. Laws 2022 (Special Session), P.L. 180(ss) (SB 2), signed by the governor on Aug. 5, 2022.

Kentucky: The Kentucky Department of Revenue (KY DOR) recently issued guidance on several services that become taxable on January 1, 2023 as a result of the enactment of HB 8 earlier this year. The guidance covers the following services: (1) photography and photo finishing; (2) rental of space for meetings, conventions, short-term business uses, entertainment events, weddings, banquets, parties and other short-term social events; (3) certain instructional, camp and training; (4) interior decorating and design; (5) labor to repair or alter apparel, footwear, watches or jewelry when no tangible personal property is sold in the transaction; (6) labor and services to repair or maintain commercial refrigeration equipment and systems when no tangible personal property is sold in that transaction including service calls and trip charges; and (7) extended warranty. The KY DOR noted that taxation of these services "creates significant changes to guidance previously given to businesses on how to handle both the sales and purchases of these services." Ky. Dept. of Rev., [Kentucky Sales Tax Facts](#) (September 2022).

Michigan: The Michigan Department of Treasury (MI DOT) explained that generally sales of gift cards and gift certificates (collectively, gift cards) are not subject to sales and use tax even when sold as tangible personal property (e.g., plastic card, paper certificate). Rather, gift cards are intangible property, representing the monetary value for which the card can be redeemed. When a gift card is redeemed for taxable property, the seller must remit tax on the transaction. If the gift card does not have a specified monetary value, such as a gift card that can be redeemed for something specific (e.g., a three night stay at a hotel), tax is based on the purchase price. For example, when a gift card issued by a hotel for a three-night stay is redeemed, the amount of tax due is based on the value of the of the accommodation at the time of rental. Mich. Dept. of Treas., [Update](#) (August 2022).

Missouri: In response to a ruling request, the Missouri Department of Revenue (MO DOR) determined that a medical corporation's sales of hydro embolization coils are subject to sales and use tax because they do not qualify as durable medical equipment, prosthetic devices or orthopedic devices. The MO DOR explained that the hydro embolization coils do not qualify as prosthetic devices as they do not replace the function of a permanently inoperative or malfunctioning internal body organ. It is not an orthopedic device since it is not a rigid or semi-rigid casting material used to support a body member and it does not restrict or eliminate motion in the injured part of the body. Lastly, the hydro embolization coils do not qualify as durable medical equipment because it is not one of the listed items. Mo. Dept. of Rev., [LR 8208](#) (August 25, 2022).

Missouri: An out-of-state ticket broker is not required to collect and remit Missouri sales tax on its sales of event tickets. Under Missouri law, the place of amusement and entertainment is required to collect and remit sales tax on their sales for admissions or seating accommodations, and any subsequent sales of such admissions or seating accommodations will not be subject to tax if the initial sale was an arms' length transaction for fair market value with an unaffiliated entity. Accordingly, the broker should pay sales tax on its purchases of the tickets. Mo. Dept. of Rev., [Letter Ruling 8196](#) (June 2, 2022).

Missouri: A political action committee's purchases of branded, promotional gift items it gives to supporters in exchange for their donations are subject to Missouri's sales and use tax. The promotional items are not sold at retail, but rather the items are used or consumed by the committee as a gift to supporters and the committee gains the benefit of advertising their branded products. Mo. Dept. of Rev., [Letter Ruling 8192](#) (June 1, 2022).

South Carolina: A retail book store's club membership fees, which entitled members to receive retail discounts, are included in its gross proceeds of sales and, therefore, are subject to South Carolina's sales tax. In affirming the lower court's ruling, the South Carolina Supreme Court (court) explained that "gross proceeds of sales" is defined as "the value *proceeding or accruing from* the sale, lease, or rental of tangible personal property," and that the term "proceeding" is critical, noting that "[f]or a monetary value to proceed from something, the value must come from it." In this case the value of the club membership originates from the sales of taxable goods since "the only benefit to buying the ... membership is discounts on taxable transactions." The book store does not require membership to enter the store and the membership does not give proprietary rights such as advance purchasing. The only benefit the membership gives to members over the general public is that members pay less to buy books and merchandise. The court also made clear that it reached this conclusion based on statutory interpretation and "not based on any deference to the [South Carolina Department of Revenue]." [Books-A-Million, Inc. v. S.C. Dept. of Rev.](#), Op. No. 28110 (S.C. S. Ct. September 14, 2022).

Tennessee: In response to a ruling request, the Tennessee Department of Revenue (TN DOR) determined that an out-of-state nonprofit's sales of subscriptions to its portfolio of print and electronic versions of its primary publications, which the TN DOR said meet the definition of magazine, as well as its other publications and databases are not subject to sales and use tax. The TN DOR explained that (1) the printed magazines are specifically exempt from sales and use tax provided specific criteria is met, such as being distributed via the US mail or common carrier (which in this case it is); (2) the definition of "digital books" specifically excludes "newspapers, magazines, periodicals, chat room discussions and weblogs"; and (3) the databases are nontaxable information services. The TN DOR also determined that the nonprofit's sales of advertising included in its print and online publications are not subject to sales and use tax. Tenn. Dept. of Rev., [Letter Ruling #22-06](#) (August 8, 2022).

Texas: A company's sales of various subscriptions for online learning products generally are not subject to Texas sales and use tax. These nontaxable products include access to digital courses, assessments, homework, online tutors, online advisors, assigned live "success coaches" as well as proctored exams and the ability to download pdf copies of assessments and transcripts. The Texas Comptroller determined that these services do not resemble the types of services described in Rule 3.342(a)(6) and are not taxable information services. Sales of its product that help teachers manage their classroom and curriculum, however, are subject to tax as a data processing service. The functions of this product, which involve the storage, retrieval and compilation of data and information related to lessons and students, are all elements of data processing. In addition, the company's charges for completing insertion orders, which involve the gathering of information and forwarding of prospective student information to universities that pay for marketing leads on such students, are subject to sales tax as an information services. Note, that 20% of the taxable data processing services and taxable information services are exempt from tax. Tex. Comp. of Pub. Accts., [Star No. 202206014L](#) (June 10, 2022).

Virginia: The Virginia Department of Taxation (VA DOT) issued guidelines for the application of retail sales and use tax (RSUT) and transient occupancy taxes to sales of accommodations facilitated by an accommodations intermediary. Law enacted in 2022 (chs. 7 and 640 Laws 2022) changed the application of the RSUT and transient occupation taxes for such sales. The guidelines provide processes and procedures for implementing the application of these taxes to such sales as required by the 2022 law changes. The guidelines: (1) include a history of the taxation of sales of accommodations facilitated by accommodations intermediaries; (2) provide an overview of the 2022 law changes; (3) define key terms applicable for purposes of RSUT and transient occupancy taxes, such as "accommodations", "accommodations fee", "accommodation intermediary"; "room charge", "discount room charge", and "short-term rental"; (4) explain the collection of tax beginning October 1, 2022, invoice requirements, and when an accommodations intermediary is obligated to register and collect RSUT as a marketplace facilitator. The guidelines include illustrative examples. The VA DOT noted that the "guidelines represent [its] interpretation of the relevant laws ... [and] do not constitute

formal rulemaking and ... do not have the force and effect of law or regulation." The guidelines take effect October 1, 2022. Va. Dept. of Taxn., "[2022 Guidelines for the Application of the Retail Sales and Use Tax to Sales of Accommodations Facilitated by Accommodations Intermediaries](#)" (August 2022).

Sales and Use Tax Exemptions, Exclusions and Refunds

California: New law ([SB 1382](#)) exempts from sales and use tax the sale, storage, use or other consumption in California of a qualified motor vehicle (e.g., plug-in hybrid vehicles, zero-emission vehicles) sold to a qualified buyer. The exemption applies to sales made on or after January 1, 2023 until January 1, 2028. The exemption does not apply to local sales and use tax or to specified state sales and use taxes from which the proceeds are deposited into the Local Revenue Fund, the Local Revenue Fund 2011, or the Local Public Safety Fund. Cal. Laws 2022, ch. (SB 1382), signed by the governor on September 16, 2022.

California: New law ([AB 2622](#)) extends until January 1, 2026 (from January 1, 2024) the partial sales and use tax exemption for specified zero-emission technology transit buses until Jan. 1, 2026 (from January 1, 2024). This exemption applies to the sale, storage, use or other consumption in California of specified zero-emission technology transit buses sold to a city, county, city and county, transportation or transit district, or other public agency that provides transit service to the public that is eligible for the California Hybrid and Zero-Emission Truck and Bus Voucher Incentive Project. Cal. Laws 2022, ch. 353 (AB 2622), signed by the governor on September 16, 2022.

California: Vetoed bill ([AB 1951](#)) would have temporarily provided a full sales and use tax exemption for gross receipts from the sale of, and storage, use or other consumption of, qualified tangible personal property purchased by a qualified person for use primary in manufacturing. Current law continues to provide a partial exemption through June 30, 2030. In his veto message, Governor Newsom cited "lower-than-expected revenues" from the first few months of the year and said that bills with a significant costs, such as AB 1951, should be considered as part of the annual budget. AB 1951 was vetoed on September 15, 2022.

Colorado: New law ([SB 22-051](#)) provides a sales and use tax exemption for eligible decarbonizing building materials that are on the list of eligible materials maintained by the Office of the State Architect, applicable to sales, storage and use of such materials beginning July 1, 2024 through June 30, 2034. Eligible decarbonizing building materials include: asphalt and asphalt mixtures, cement and concrete mixtures, glass, post-tension steel, reinforcing steel, structural steel and wood structural elements. Manufacturers of eligible materials can submit an environmental product declaration to the State Architect; the list of eligible materials will be provided by the State Architect by January 1, 2024. The new law also exempts from sales and use tax sales, storage and use of heat pump systems and heat pump water heaters

that are used in commercial or residential building, applicable 2023 through 2032. Colo. Laws 2022, SB 22-051, signed by the governor on June 2, 2022.

Georgia: Payments made by an entertainment business to another entity for leases of coin-operated amusement machines (COAMS) are not exempt from sales and use tax because the exempting statute, OCGA §48-8-3(43), contains no language that the legislature intended to exempt amounts paid to lease COAMS from tax. In so holding, a Georgia appeals court explained that OCGA §48-8-3(43) exempts revenue generated from all bona fide COAMS that vend or dispense music or are operated for skill, amusement, entertainment or pleasure which are in commercial use and provided to the public for play. The court said it “discern[s] that the absence of such language was a matter of considered choice” and that it “cannot add a line to the law” when the statutory provision does not provide an exemption for lease payments. [Funvestment Group, LLC v. Crittenden](#), No. A22A0193 (Ga. Ct. App., 1st Div., June 23, 2022).

Louisiana: New law ([SB 129](#)) expands the local sales and use tax exemption for prescription drugs for treating certain diseases and conditions to include those that are injected (prior to this change, the exemption applied to infused prescription drugs), and changes the place in which the infusion or injection must take place from a physician’s office to a medical clinic. The law also expands the list of prescription drugs the exemption applies to. These provisions took effect July 1, 2022. La. Laws 2022, Act 79 (SB 129), signed by the governor on May 24, 2022.

Missouri: New law ([SB 745](#)) exempts from sales and use tax all purchases by a company of solar photovoltaic energy systems, components used to construct a solar photovoltaic energy system and all purchases of materials and supplies used directly to construct or improve such systems, if the systems: (1) are sold or leased to an end user or (2) are used to produce, collect and transmit electricity for resale or retail. The law also establishes the "Task Force on Fair, Nondiscriminatory Local Taxation Concerning Solar Energy Systems," that studies (1) the economic benefits and drawbacks of solar energy systems to local communities and the state; (2) the fair, uniform and standardized assessment and taxation of solar energy systems and their connected equipment owned by a retail or wholesale provider of electricity at the county level; (3) compliance with existing state and federal programs and regulations; and (4) potential legislation that would provide a uniform assessment and taxing method for solar energy systems. The report is due to the general assembly by December 31, 2022. Mo. Laws 2022, SB 745, signed by the governor on June 29, 2022.

New Jersey: New law ([A. 4208](#)) provides a sales and use tax exemption to supermarkets and grocery stores located in a food desert community or located in an enterprise zone and received an annual certification of eligibility from the Department of Community Affairs (DCA). The certification is effective for the 12-month period immediately following the date of approval by the DCA. To qualify for the certification, the supermarket and grocery store must demonstrate to the DCA that during the 12-month period immediately preceding the date of application that:

(1) not less than 30% of the hired employees were comprised of any combination of persons who were unemployed for not less than three consecutive months immediately preceding the date of employment or person with a disability; or (2) not less than 35% of the hired employees are residents of a municipality in which the enterprise zone has been established and the store actively participated with the One Stop Career Centers in the recruitment of such individuals. These provisions took immediate effect. N.J. Laws 2022, ch. 42 (A. 4208), signed by the governor on June 30, 2022.

New York: New law ([A. 8528-A/ S. 8033-A](#)) exempts from sales and use tax sales of diapers intended for human use including disposable, reusable, adult and children. This exemption applies to sales made on or after the first day of the sales tax quarterly period next commencing at least 90 days after this Act becomes law. N.Y. Laws 2022, ch. 386 (A.8528-A/S. 8033-A), signed by the governor on July 19, 2022.

Tennessee: New law ([SB 2350/HB 2265](#)) modifies the pollution control sales tax credit by expanding the definition of green energy production facility to include the storage of electricity, effective July 1, 2022. Tenn. Laws 2022, Pub. ch. 1139 (SB 2350/HB 2265), signed by the governor on June 3, 2022.

Tennessee: A provision of new law (2022 TN [SB 2898/HB 2883](#)) exempted from sales tax retail sales of food and food ingredients sold on August 1, 2022 through August 31, 2022. This exemption did not apply to sales from micro markets or vending machines or devices. The Tennessee Department of Revenue issued guidance on the food/food ingredients sales tax holiday, including a definition of "food and food ingredients" and guidance on reporting exempt sales. "Food and food ingredients" are defined as "liquid, concentrated, solid, frozen, dried, or dehydrated substances that are sold to be ingested or chewed by humans and are consumed for their taste or nutritional value." It does not include alcoholic beverages, tobacco, candy, dietary supplements and prepared food. 2022 Tenn. Pub. Acts, ch. 1131 (2022 TN SB 2898/HB 2883), signed by the governor on June 1, 2022; Tenn. Dept. of Rev., [Notice #22-10 "2022 Sales Tax Holiday for Food and Food Ingredients"](#) (June 2022).

Tennessee: New law (2022 TN [SB 1857/HB 1874](#)) exempts from sales and use tax the sale of all coins, currency and bullion that are: (1) manufactured in whole or in part from gold, silver, platinum, palladium or other materials; (2) used solely as legal tender, security or commodity; and (3) sold based primarily on their intrinsic value as precious material or collectible items rather than their representative value as a medium or exchange. This exemption took immediate effect. 2022 Tenn. Pub. Acts, ch. 1092 (2022 TN SB 1857/HB 1874), signed by the governor on May 27, 2022; Tenn. Dept. of Rev., [Notice #22-08 "Coins, Currency, and Bullion"](#) (June 2022).

Vermont: New law ([HB 738](#)) expands the sales and use tax exemption for manufacturing machinery and equipment to exempt manufacturing machinery and equipment that is part of

an integrated production process. As revised, the exemption applies to machinery and equipment used or consumed as an integral or essential part of an integrated production operation by a manufacturing or processing plant or facility engaged in the manufacture of tangible personal property for sale, or in the manufacture of other machinery or equipment, parts or supplies for use in manufacturing process. For purposes of this provision, machinery and equipment is deemed to be used as an integral or essential part of an integrated production operation when used during the integrated production operation. The law defines what an "integrated production operation" does and does not mean. This change took effect July 1, 2022. Vt. Laws 2022, Act 179 (HB 738), signed by the governor on June 7, 2022.

Virginia: New law ([HB 90/SB 451](#)) beginning on and after Jan. 1, 2023, exempts from state retail sales and use tax (1) food purchased of food for human consumption and (2) essential personal hygiene products. These items, however, are still subject to the 1% local option sales tax. The law includes definitions of "food purchased for human consumption" and "essential personal hygiene products". Va. Laws 2022 Spec. Sess.1, ch. 5 (HB 90) and ch. 4 (SB 451), both signed by the governor on Aug. 4, 2022.

Washington: The Washington Department of Revenue issued guidance on the (1) application of the state's sales and use tax exemption for machinery and equipment when petroleum products are manufactured at fuel storage terminals, and (2) imposition of the state's hazardous substance tax and petroleum products tax to fuel blending manufacturing activity. The guidance includes illustrative examples. Wash. Dept. of Rev., [ETA 3234.2022 "Blending of Petroleum Products at Storage Terminals"](#) (June 27, 2022).

Transactions and Services

Hawaii: New law ([HB 1971](#)) regulates and taxes peer-to-peer (PTP) car-sharing. Specifically, PTP car-sharing is subject to the general excise tax and the rental motor vehicle surcharge tax. The PTP car-sharing program is responsible for collecting and remitting any tax and surcharges due to the Hawaii Department of Taxation. PTP car-sharing is defined as "the operation, use, or control of a motor vehicle by an individual other than the motor vehicle's owner through a [PTP] car-sharing program." PTP car-sharing program does not include a transportation network company, car-sharing organization defined in Haw. Rev. Stat. §251-1, travel agencies, or person acting as an activity desk. For purposes of the vehicle surcharge, PTP car-sharing does not mean providing a rental motor vehicle to the public (as the phrase is used in Haw. Rev. Stat. §251-3). The provisions of HB 1971 took effect July 1, 2022. Haw. Laws 2022, Act 77 (HB 1971), signed by the governor on June 17, 2022.

Missouri: New law ([HB 2400](#)) provides that "retail sale" or "sale at retail" does not include the purchase of electricity, electrical current, water and gas by a person operating a hotel, motel or other transient accommodation establishment if such purchase (1) is used to heat, cool or provide water or power to the guests' accommodations, and (2) are included in the charge

made for the accommodations. Persons required to remit sales tax on such purchases before August 28, 2022 will be entitled to a refund of such taxes remitted. Mo. Laws 2022, HB 2400, signed by the governor on June 30, 2022. (A similar provision is in Mo. Laws 2022, [SB 745](#), signed by the governor on June 29, 2022.)

New Jersey: New law ([A.4239](#)) modifies the tax treatment of signs and sign fabrication and installation services to subject sign fabrication and installation services to sales tax even when such installation results in a capital improvement, applicable to sign fabrication and installation services rendered on or after October 1, 2022. Under prior law, if installation resulted in a capital improvement, sales tax was not collected from the customer, rather the entity installing the sign was required to collect use tax. In response to this law change, the New Jersey Division of Taxation (NJ DOT) issued guidance, stating that effective October 1, 2022, sign installers can purchase sign materials for use in sign fabrication and installation as a resale. The sign installer will need to issue a completed resale certificate to the seller to document the exemption. The sign installer also must charge sales tax to the customer on the sale of all signs as well as on the installation of all signs. The NJ DOT noted that labor to install signs that are not permanently affixed to real property as well as charges for maintaining, servicing and repairing real property and tangible personal property, remain taxable. N.J. Laws 2022, ch. 97 (A.4239), signed into law August 5, 2022; N.J. Div. of Taxn., "[Sign Purchases and Installation Services Sales and Use Tax](#)" (last updated August 25, 2022).

Tennessee: In response to a ruling request, the Tennessee Department of Revenue (TN DOR) described the application of Tennessee's sales and use tax to fees and charges of a company that provides research, development and manufacturing services to clients for use in clinical trials. Based on the facts, the TN DOR determined that products manufactured by the company and sold to clients for use in clinical trials are exempt from sales and use tax as prescription drug. The company's sale of products it manufactures to clients where the client dispenses the products to patients participating in the clinical trials are not exempt from sales and use tax as sales for resale. The TN DOR explained that the resale exemption does not apply because simply transferring the products to these patients or administering the product as part of the patient's participation in the clinical trial "does not constitute a subsequent, bona fide sale." Thus, to the extent products include items that do not fall within the scope of the prescription drug exemption, an actual resale must occur in order for the resale exemption to apply. The taxability of the company's Suite Reservation Fees, which are properly characterized as part of the sales price of the manufactured product or part of the sales price of nontaxable research services (e.g., innovation laboratories), depends on whether the product manufactured by the company is taxable. If the product is taxable, the Suite Reservation Fees are subject to tax; if the product is not taxable, such fees related to the manufacture of the product also are not taxable. Lastly, the TN DOR determined that the company would qualify for the research and development (R&D) sales and use tax exemption for its purchases of machinery, apparatus and equipment when the equipment is primarily used in providing R&D services. Tenn. Dept. of Rev., [Letter Ruling #22-04](#) (June 17, 2022).

Tennessee: Fees a delivery network company charge to sellers and service providers for connecting the seller/service provider to the purchaser, which the company characterizes as lead generation, and for processing payments for purchased items are not subject to Tennessee sales and use tax. The Tennessee Department of Revenue (TN DOR) determined that the true object of the transactions covered by the fees are non-taxable lead generation and payment processing services. The TN DOR found the taxable web-based interface and App (collectively, "software"), which are used to connect sellers, services providers and purchasers via the company's platform, "merely incidental" to the service. The TN DOR explained that without being connected to purchasers who pay for and have items delivered, the "software would be of little to no use to the Sellers and Service Providers." Tenn. Dept. of Rev., [Letter Ruling #22-02](#) (April 11, 2022).

Texas: The Texas Comptroller of Public Accounts recently updated a publication listing types of services that are taxable, including examples and references to additional information. The following are 17 broad categories of taxable services: amusement; cable television and bundled cable; credit reporting; data processing; debt collection; information; insurance; motor vehicle parking and storage; nonresidential real property repair, restoration or remodeling; personal property maintenance, remodeling or repair; real property; security; telecommunications; telephone answering; utility transmission and distribution; and taxable labor such as photographers, draftsmen, artists, and tailors. Tex. Comp. of Pub. Accts., [Publication 96-259 "Taxable Services"](#) (July 2022).

Technology and Digital Taxes

Maryland: New law (2022 MD [HB 791](#) and [SB 723](#), respectively) amends the definition of "digital products" to exclude certain products. Specifically, "digital products" do not include: (1) a product having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities where the purchaser holds a copyright or other intellectual property interest in the product, and the purchaser only uses the product for commercial purposes (including advertising or other marketing activities); or (2) computer software or software as a service purchased or licensed solely for commercial purposes in an enterprise computer system (including operating programs and application software used exclusively by such system) that is housed or maintained by the purchaser or on a cloud server. This change takes effect July 1, 2022. Md. Laws 2022, chs. 534 and 535 (2022 MD HB 791 and SB 723, respectively), enacted without the governor's signature on May 29, 2022.

Minnesota: The Minnesota Department of Revenue (MN DOR) update its digital products sales tax fact sheet to explain that non-fungible tokens (NFTs) are subject to tax when the underlying product (i.e., goods or services) is taxable. The MN DOR said that NFTs may entitle purchasers to receive products or services such as digital products (e.g., music, video games, audio visual works), admission to sporting events or concerts, prepared food and beverages, and tangible

personal property (e.g., collectibles or memorabilia). Minn. Dept. of Rev., [Sales Tax Fact Sheet 177 "Digital Products"](#) (updated Aug. 2022).

Puerto Rico: The Governor of Puerto Rico signed Act 52 into law on June 30, 2022 (Act 52-2022). Among other changes, Act 52-2022 amends various provisions of the Puerto Rico Internal Revenue Code (PR Code) to incorporate the term digital products as a taxable item, and to establish the sourcing rules for the sale of digital products. Act 52-2022 also defines market facilitator, market seller, digital products, specific digital products and other digital products. Additionally, Act 52-2022 amends the SUT provisions to eliminate the requirement for taxpayers to pay the sales tax on a bimonthly basis. Act 52-2022 establishes that the last month to comply with the requirement to pay the sales tax on a bimonthly basis was June 2022. For more information on this development, see EY Tax Alert [2022-1289](#) (August 24, 2022).

Controversy and Compliance

Arizona: Resolution ([SCR 1049](#)), if approved by voters during the November 8, 2022 general election, would impose an additional 0.1% transaction privilege tax and use tax on certain business, effective from and after December 31, 2022 through December 31, 2042. The additional tax would be imposed on persons engaging in a business with a classification listed in Ariz. Stat. §42-5010(A)(1), which currently includes: transportation, utilities, telecommunications, pipeline, private car line, publication, job printing, prime contracting, amusement, restaurant, personal property rental, and retail. Revenues collected from this additional tax would be deposited into the newly established Fire District Safety Fund. The resolution was approved by the General Assembly and transmitted to the Secretary of State on June 23, 2022.

California: New law ([SB 1312](#)) modifies the definition of marketplace facilitator to create an exception for vehicle rental broker for the facilitation, for a commission, fee or other consideration, of a passenger vehicle rental on behalf of a non-related rental company. This provision takes effect Jan. 1, 2023. Cal. Laws 2022, ch. 228 (SB 1312), signed by the governor on August 29, 2022.

California: New law ([AB 2887](#)) increases to \$150 million per year (from \$100 million) the amount of sales and use tax exclusions the California Alternative Energy and Advanced Transportation Financing Authority can authorize for projects that promote California-based manufacturing, California-based jobs, advance manufacturing, greenhouse gas reduction and the reduction in air and water pollution or energy consumption. The increased exclusion amount is authorized through January 1, 2026. These changes took immediate effect. Cal. Laws 2022, ch. 248 (AB 2887), signed by the governor on September 6, 2022.

Colorado (local): New law ([CB22-0901](#)) amends Denver's retail sales and use tax⁴ code provisions to exempt from tax any government fees, such as Colorado's new 27 cent Retail Delivery fee, imposed directly on the purchaser and required to be held in trust by the imposing government and separately stated on the invoice given to the purchaser at the time of sale. CB22-0901 was signed by the Denver Mayor on August 23, 2022.

Illinois: The Illinois Department of Revenue (IL DOR) issued a compliance alert on the improper reporting of receipts that qualify for the suspension of low rate of state sales and use tax on retail sales of groceries. The IL DOR said the following common errors should be corrected immediately: (1) retailers excluding sales of groceries from gross receipts reported on Form ST-1, Line 1 (rather, these receipts should be include and then the retailer can claim a credit for the retails sales of groceries on Schedule GT); (2) retailers including sales of groceries in their taxable receipts on Form ST-1 and then deducting the entirety of those receipts on Line 16 of Schedule A on Form ST-1 (rather, the credit for such sales should be claimed on Schedule GT); and (3) retailers selling both groceries and other low-rate items (e.g., medicine, medical supplies) claiming credit on Schedule GT for retail sales of all low-rate items and, thus, claiming a credit for low-rate items that do not qualify for the suspension. The IL DOR also noted that consumers are reporting that some retailers are collecting tax on retail sales of groceries that qualify for the suspension. The IL DOR's compliance alert describes how to properly report these receipts as well as calculating and claiming the credit, including illustrative examples. Ill. Dept. of Rev., [Compliance Alert: Improper Reporting of Grocery Tax Suspension Sales on Form ST-1](#) (September 2022).

Iowa: On June 17, 2022, Governor Kim Reynolds signed into law [Senate File 2367](#) (SF 2367), which changes the state's sales and use tax exemptions and filing periods. Under Iowa Code §423.3(49) exempts from sales tax certain goods and services used by manufacturers of food products for human consumption. SF 2367 clarifies that this exemption also applies to manufacturers that primarily manufacture food ingredients. SF 2367 makes this change retroactive to January 1, 2019, and limits refunds of taxes, interest and penalties that may otherwise result from these changes to \$100,000 for any calendar year. Refund claims based on these changes must be filed by October 1, 2022. SF 2367 also changes the sales tax base. Effective January 1, 2023, the sales tax does not apply to the following purchases: specified digital products; prewritten computer software and related services sold to public utilities; feminine hygiene products; and child and adult diapers. Effective January 1, 2024, sales tax applies to computers and peripherals that an insurance company, financial institution or commercial enterprise under Iowa Code § 423.3(47)(a)(4) uses to process or store data or information. SF 2367 changes certain sales and use tax compliance procedures as of the date of enactment. Sales and use taxes must now be reported on a single return instead of separate returns for each tax. Additionally, persons owing \$1,200 or less in sales or use tax per calendar year must file annually, while all others must file monthly (changed from quarterly filing). These

⁴ Retail Sales Tax, Art. II, Ch. 53 of the Denver Revised Municipal Code (DRMC) and Use Tax Article, Art. III, Ch. 53 of the DRMC.

changes are effective immediately. The Iowa Department of Revenue (Department) may adopt emergency rules to implement these changes. SF 2367 also includes a temporary grace period for interest and penalties. Taxpayers that cannot file returns and remit tax in accordance with these new filing periods may file returns and pay tax for periods ending on or before September 30, 2022, according to their registration as of June 30, 2022, without penalty and with interest suspended until October 1, 2022. SF 2367 allows the Department to simultaneously contact Certified Service Providers and sellers registered under the Streamlined Sales and Use Tax Agreement if a payment or filing issue arises.

Kansas: The Kansas Department of Revenue issued guidance on the repeal of the accelerated sales and use tax monthly filing frequency by 2022 KS Laws HB 2136. Starting July 1, 2022, the filing frequency was changed to monthly. The monthly filing requirement applies when a retailer's total tax liability exceeds \$4,000 in any calendar year; the return is due each month on or before the 25th day of the following month. In addition, businesses that report the vehicle rental excise on an accelerated monthly basis will now file the vehicle rental excise tax on a monthly basis. Kan. Dept. of Rev., [Notice 22-02 "Accelerated Monthly Filing Frequency for Sales Tax Filers"](#) (July 1, 2022).

Louisiana: New law ([SB 235](#)) requires the Louisiana Sales and Use Tax Commission for Remote Sellers, in consultation with the Louisiana Uniform Sales Tax Board and the Louisiana Department of Revenue (LA DOR), to develop a single electronic return for all state and local sales and use taxes. The Commission has the authority to contract for the collection of state and local sales and use tax from qualifying nonremote sellers. The Commission also must provide the minimum federally required tax administration, collection and payment requirements with respect to the collection and remittance of sales and use tax on nonremote sales. Under the law, the Commission cannot begin to develop a single electronic return until it executes a contract to do so with either a local tax collector of the LA DOR. The system will be available by the first day of the second calendar quarter following execution of the contract. The new law also allows the Commission to enter into voluntary disclosure agreements with qualifying nonremote sellers. SB 235 takes effect January 1, 2023. La. Laws 2022, Act 685 (SB 235), signed by the governor on June 18, 2022.

Louisiana: New law ([SB 443](#)) provides for uniform direct payment number procedures. Effective January 1, 2023, the Louisiana Department of Revenue (LA DOR) is required to submit a taxpayer's application for a direct payment number to the local collector in the parish(es) in which the taxpayer has a qualified manufacturing establishment or facility. The LA DOR will issue the direct payment number within 60 days of the local collector's receipt of the application. If the taxpayer meets the qualification for the direct payment number but the local collector does not provide written approval within the 60 day period, the LA DOR will issue the number to the taxpayer. If a local collector timely denies the application of a qualified taxpayer, the taxpayer will be issued a direct payment number that only works for state sales and use tax purposes. The LA DOR will revoke the direct payment number if, after examination,

it determines that the taxpayer no longer qualifies. La. Laws 2022, Act 428 (SB 443), signed by the governor on June 15, 2022.

New York: The New York State Department of Taxation and Finance issued guidance on new taxes imposed on peer-to-peer (P2P) car sharing beginning September 1, 2022. The new 3% statewide P2P car sharing tax is due on the gross receipts paid by the shared vehicle driver for use of a shared vehicle when the shared vehicle driver takes possession of the shared vehicle in New York. In addition, either a 3% regional transportation tax or a 3% Metropolitan Commuter Transportation District tax is imposed, depending on where the driver takes possession of the shared vehicle in New York. There is a rebuttable presumption that every transfer of possession of a shared vehicle in New York is subject to these taxes. These new taxes are in addition to state and local sales and use taxes imposed. The guidance also describes the procedures for collecting the tax and filing returns, and it includes definitions of key terms. N.Y. State Dept. of Taxn. and Fin., [TSB-M-22\(1\)S](#) (August 30, 2022).

Oklahoma: New law (2022 OK [SB 1339](#)) amends the definitions of "marketplace facilitator" and "remote seller" and changes the term for items subject to sales from "tangible personal property" to "product." (Throughout the marketplace facilitator and remote seller provisions the term "tangible personal property" is replaced with the new term "product(s)".) The term "product" is defined as tangible personal property, services or other transactions subject to Oklahoma's sales and use tax. The new law also provides that the collection obligation of a marketplace facilitator or a referrer that elects to collect and remit sales and use tax also applies to local taxes administered by the Oklahoma Tax Commission. These changes take effect January 1, 2023. 2022 Okla. Sess. Laws, ch. 396 (2022 OK SB 1339), signed by the governor on May 26, 2022.

Puerto Rico: In Administrative Determination 22-07, the Puerto Rico Treasury Department has announced prepared food is temporarily exempt from sales tax from September 22, 2022 to October 6, 2022, as a result of the state of emergency declared by the Governor of Puerto Rico due to Hurricane Fiona. This temporary exemption does not apply to alcoholic beverages. For more on this development, see EY [Tax Alert 2022-1438](#) (September 23, 2022).

Texas: The Texas Comptroller of Public Accounts (Comptroller) has proposed rule amendments to [34 TAC §3.334](#) (Section 3.334) regarding local sales and use tax. In August 2022, a Texas District Court found that the Comptroller failed to "substantially comply with" requirements of the Texas Administrative Procedure Act, specifically Tex. Gov. Code § 2001.024, in adopting amendments to 34 TAC §3.334(b)(5) [in 2020], which as amended would source online sales to the buyers location instead of the seller's business location." The court remanded the case back to the Comptroller for "revision or readoption [of the rule amendments] through established procedures within a reasonable time." The Comptroller is now proposing to amend Section 3.334(b)(5) and other parts of the rule "with an explanation that augments" the those published in the proposed rulemaking (January 2020) and the notice adopting the amendments

(May 2020). Under the proposal, the definition of “place of business of the seller” in Section 3.334(a)(16) would be amended to make clear that a place of business of the seller would have to be an established outlet, office or location the seller operates for purposes of receiving orders for taxable items from persons other than employees, independent contractors and affiliated natural persons. (The term does not include a computer server, internet protocol address, domain name, website or software application.) The established outlet, office or location would have to be staffed by at least one sales personnel. The proposal also would provide that the “purpose” element could be established by showing that the sales personnel received three or more orders for taxable items at the facility during the calendar year. Proposed amendments to Section 3.334(b)(1) would make clear that the forwarding of previously received orders to the facility for fulfillment does not make the facility a place of business. According to the Comptroller, proposed amendments to Sections 3.334(b)(4) and (5) are “for stylistic reasons and to more clearly state [its] application of the definition of place of business of the seller from subsection (a)(16): ...” Subsection (b)(4) treats an order received by a salesperson who is not at a place of business of the seller when the salesperson receives the order as being received at the location where the salesperson operates (i.e., the fixed location where the salesperson conducts work-related activities). Subsection (b)(5) provides that an order that is not received by a salesperson is received at the location this is not a place of business of the seller, such as orders received by a computer server through a shopping cart software program or by an automated telephone ordering system. In Section 3.334(c)(2)(B)(ii), the term “Order not fulfilled in Texas” would be amended to make the language more consistent with Tex. Tax Code §321.205(c). The amendment would provide that a sale is not considered to be consummated in Texas when an order is received by a seller at a location that is not a place of business of the seller in Texas and is fulfilled from a location outside the state. A use, however, would be considered to be consummated at the first point in Texas where the item is stored, used or consumed after interstate transit ceased. There would be a rebuttable presumption that a taxable item delivered to a point in Texas will be used for storage, use or consumption at that point. Local use tax would be collected as provided in Section 3.334(d). The Comptroller will hold a public hearing on the proposed amendments on Monday, Oct. 17, 2022. Comments on the proposed amendments are due no later than 30 days from the date the proposal was published in the Texas register, i.e., Oct. 23, 2022. Tex. Comp. of Pub. Accts., Prop. Rules 34 TAC §3.334 (47 TexReg 6158 Sept. 23, 2022).

Texas: A District Court Judge for Travis County found that the Texas Comptroller of Public Accounts failed to "substantially comply with" requirements of the Texas Administrative Procedure Act, specifically Tex. Gov. Code § 2001.024, in adopting amendments to 34 TAC §3.334(b)(5), which as amended would source online sales to the buyers location instead of the seller's business location. In July 2021, the City of Round Rock filed a lawsuit, seeking to overturn this provision, arguing that the rule is contrary to the Tax Code. (Other cities challenging the rule include Coppell, Humble, DeSoto, Carrollton and Farmers Branch.) Following an Aug. 30, 2021 hearing, the Comptroller and the city reached an agreement, enjoining the Comptroller from implementing or enforcing Rule 3.334(b)(5) until a final hearing

on the merits or further order from The Travis County District Court. In an Aug. 10, 2022 letter ruling, the court remanded the case back to the Comptroller for "revision or readoption through established procedures within a reasonable time." The court also directed the parties to submit an order consistent with the court's findings and ruling. *City of Coppell, Tex. v. Hegar*, Cause No. D-1-GN-21-003198 (Tex. Dist. Ct., Travis Cnty., Aug. 10, 2022); *City of Round Rock, Tex. V. Hegar*, Cause No. D-1-GN-21-003203 (Tex. Dist. Ct., Travis Cnty., Aug. 10, 2022).

Virginia: New law ([HB 29](#)) eliminates the requirement that certain Retail Sales and Use Tax dealers make Accelerated Sales Tax (AST) payments for periods beginning after June 30, 2021. Following this law change, the Virginia Department of Taxation said no AST payment is due in June 2022. Under prior law, dealers or permit holders with taxable sales and purchases of \$10 million 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% 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. While the new law eliminated the AST payments, penalties and interest for all prior years' AST payments remain due and are collectible. Va. Laws 2022 (Special Sess. I), HB 29 (item 3-5.06), enacted June 17, 2022; Va. Dept. of Taxn., [Tax Bulletin 22-10](#) (June 22, 2022).

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