State Tax Alert
April 2023

State Sales and Use Tax Quarterly Update – April 2023

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.

What is FairTax and why should we care?

It seems that ever since the U.S. adopted income-based taxes on corporations and individuals in the early part of the 20th Century, taxpayers and legislators have wanted something different; with a national consumption-based tax being the most frequently suggested alternative. While the U.S. remains the only OECD country with no value-added or broad-based national consumption tax, excise taxes historically have been implemented at the federal level to fund specific programs and causes (*e.g.*, the Medical Device Excise Tax enacted as part of the 2010 Affordable Care Act; the 1898 Federal Telephone Excise Tax enacted to fund the Spanish-American and Philippine-American Wars; the 1978 "Gas-Guzzler" Excise Tax enacted to encourage the production of fuel-efficient vehicles). However, such taxes never have served – or been meant to serve – as a primary mechanism for governmental funding.

Is that about to change? Probably not.

Nevertheless, the most recent proposal, introduced January 9, 2023 as H.R. 25 (the "FairTax Act of 2023") has managed to generate some discussion about the possibility of shifting the way we fund the federal government away from a pure income-based tax system to a system based, at least in-part, on consumption. If enacted, H.R. 25 would impose a national sales tax on the use or consumption of taxable property or services within the U.S. The tax would operate in lieu of current corporate and individual income, payroll, and estate and gift taxes and be imposed at a 23% rate (potentially increasing to as high as 30% in subsequent years). The tax would include exemptions for used and intangible property, property or services purchased for business, export, or investment purposes, and for state government functions. Lawful U.S. residents would receive a monthly sales tax rebate (referred to as the "Family Consumption Allowance") based upon their family size and federal poverty guidelines. The states would be responsible for administering, collecting, and remitting the tax to the Treasury.

Revenue from the tax would be allocated among the general fund, the old-age and survivors insurance trust fund, the disability insurance trust fund, the hospital insurance trust fund, and the federal supplementary medical insurance trust fund. If the Sixteenth Amendment to the

Constitution (which authorizes a federal income tax) is not repealed within seven years after the enactment of this bill, the national sales tax terminates.

Currently, H.R. 25 is with the House Ways and Means Committee, and that is not expected to change, as rates, noncompliance, and other macroeconomic issues are studied. But, at least for now, those looking for an alternative to the federal income tax regime may have found a starting point.

Our Observation: A number of states have successfully adopted a similar approach, eschewing income taxes in favor of broad-based sales/use, property, and excise taxes. However, it is doubtful that such a system could easily be implemented at the federal level; accordingly, FairTax (or anything similar) is not likely to pass any time soon. There are a few motivating factors for this – most notably, any tax that would effectively increase retail prices by 23% to 30%, would naturally generate incredible public resistance, even with a corresponding offset in the consumer's overall tax burden. Also, such a radical departure from a "familiar" tax, which has been the mainstay of federal government funding for more than a century, would naturally cause some unease among taxpayers. For now, FairTax should be viewed for what it is – a first step toward possibly reforming and (in some views) modernizing the tax code, but not a final blueprint for funding the government.

Other Recent Sales and Use Tax Developments

Nexus

South Dakota: New law (SB 30) modifies South Dakota's sales and use tax nexus provisions, eliminating the 200 separate transactions threshold. Under South Dakota's modified provisions, nexus will be created if the seller's gross revenue from sales of tangible personal property, products transferred electronically or services in the state exceeds $100,000. This change takes effect July 1, 2023. S.D. Laws 2023, SB 30, signed by the governor on February 9, 2023.

Tax Base and Taxability

Alabama: In response to a ruling request, the Alabama Department of Revenue (AL DOR) said royalties a company paid to the copyright owner of medical billings codes the company licensed for use and incorporation into its software are not subject to the state's sales and use tax. The AL DOR reasoned that the licensed codes are not themselves classified as computer software, but rather it is copyrighted content in computer software that is tangible personal property. Ala. Dept. of Rev., Revenue Ruling 22-003 (June 27, 2022).

Kentucky: Legislation enacted in 2022 (HB 8) imposed sales and use tax on an additional 34 services. (*see* EY Tax Alert 2022-0564 (April 6, 2022). Many of these services were not defined

in HB 8, requiring the KY DOR to issue guidance on many of these services through frequently updated FAQs. HB 360, applicable retroactively to January 1, 2023, clarifies the definitions of the specific services made taxable in HB 8. Applicable retroactively to January 1, 2023, HB 360 also amends certain taxability and exemption provisions. Finally, HB 360 strikes former KRS 139.200(2)(r) and 139.010(22), which imposed tax on, and defined, "marketing services," making such services nontaxable. For more on this development, see EY Tax Alert 2023-0571 (March 24, 2023).

New Jersey: The New Jersey Division of Taxation (NJ DOT) updated its guidance on the application of sales and use tax on the sales of prepared food and beverages (e.g., sold by restaurants, caterers, taverns, snack bars, food trucks) to add information on the taxability of credit/debit card service charges. The NJ DOT said that a credit card surcharge added to the check when the customer pays by credit or debit card are part of the sales price subject to New Jersey sales tax. N.J. Div. of Taxn., Tax Topic Bulletin S&U-1 "Restaurants and New Jersey Taxes" (updated January 2023).

North Dakota: New law (SB 2141) modifies the definition of purchase price for motor vehicle excise tax purposes to provide that the purchase price excludes any charges or fees for auction services (this is in addition to the already existing exclusion for the amount of a manufacturers incentive or discount that reduces the amount paid by the purchasers to the seller at the time of purchase). This change is effective for taxable events occurring after June 30, 2023. N.D. Laws 2023, SB 2141, signed by the governor on March 13, 2023.

Ohio: On December 22, 2022, Governor Mike DeWine signed House Bill 223 (HB 223), which allows vendors to deduct sales tax remitted for bad debts on private-label credit accounts when the debt is written off as uncollectible by the credit account lender or by a person succeeding to those accounts. The expansion of the deduction for sales tax remitted on bad debt (bad debt deduction) is effective July 1, 2023. It is important to note that while vendors are allowed a refund when their own bad debt exceeds their taxable sales for the reporting period, a refund is not available for excess bad debt related to private label credit accounts claimed under the expanded deduction. Instead, vendors may carry forward the remaining deduction to future reporting periods. HB 223 does not limit the carryforward period. For more information on this development, *see* EY Tax Alert 2023-0046 (January 6, 2023).

South Dakota: New law (SB 58) clarifies that the 4.5% special amusement excise tax applies to receipts from the sale of any mechanical or electronic amusement device (this is in addition to receipts from the operation of such devices). This change applies July 1, 2023. S.D. Laws 2023, SB 58, signed by the governor on February 9, 2023.

Tennessee: The Tennessee Department of Revenue updated its Sales and Use Tax Manual to state that credit card convenience fees are included in the sales price of the underlying purchase and are subject to sales tax. Tenn. Dept. of Rev., Tax Manual Updates (March 2023).

Texas: In response to a ruling request, the Texas Comptroller of Public Accounts (Comptroller) determined that sales and use tax applies to a company's lump sum charges for remote services, on-site services, and add-on services. Charges for the company's remote services, which includes the sale and provision of audiovisual and videoconferencing equipment services such as Voice over Internet Protocol and other electronic transmission, are taxable as they meet the definition of telecommunications services. Further, equipment leased, rented or sold by the company is taxed as part of the telecommunications service if it is not separately invoiced (separately invoiced equipment, however, is taxable as the sale of tangible personal property (TPP)). Software provide as part of the telecommunication services is taxable TPP. The company's charges for on-site services that include the repair, maintenance, creation and restoration of software is taxable when performed by the person that sold or provided the software. Tax is due on all charges for labor or services to install, remodel, repair, maintain or restore computer hardware located in Texas, regardless of who sold the hardware. When a lump-sum charge includes both taxable and nontaxable services, the full amount of the charge is taxable. Regarding the charges for add-on services, the Comptroller determined that they are taxable as the repair, remodel, maintenance and restoration of TPP because the company could not confirm whether it did, or did not, provide the computer program involved in the service to implement, configure and manage a communication infrastructure. The Comptroller noted that the "[r]ecords must support any claim to an exclusion of sales tax …." Tex. Comp. of Pub. Accts., STAR No. 202301018L (January 3, 2023).

Texas: In response to a ruling request regarding the taxability of the retrieval of medical records, the Texas Comptroller of Public Accounts (Comptroller) determined that fees (1) covering charges the taxpayer incurs when requesting records from medical providers and (2) those for reviewing records for accuracy and completeness and to ensure they are provided in accordance with all applicable laws and regulations, are not subject to sales and use tax. The Comptroller explained that providing patient records and reviewing the records are not the provision of a taxable service. The third fee imposed for additional tasks requested by customers, such as optical character recognition, electronic bookmarking records and making additional copies, are taxable as data processing services and taxable sales of tangible personal property. Tex. Compt. of Pub Accts., STAR No. 202212003L (January 30, 2023).

Utah: New law (HB 54) will eliminate the State sales and use tax on amounts paid or charged for food and food ingredients **if** a proposal to amend the Utah Constitution — Income in S.J.R. 10 passes the Legislature and is approved by a majority of voters in the next regular general election. If S.J.R. 10 is approved, the elimination of sales and use tax on food and food ingredients will take effect on Jan. 1, 2025. Utah laws 2023, HB 54, signed by the governor on March 22, 2023.

Utah: New law (SB 14) imposes sales and use tax on sales of leased tangible personal property from the lessor to the lessee made in Utah. The law also modifies the sales and use tax

exemption for vehicles to add that the exemption applies if the sale is not from the vehicle's lessor to the vehicle's lessee. These changes take effect July 1, 2023. Utah Laws 2023, SB 14, signed by the governor on March 14, 2023.

Washington: The Washington Department of Revenue (WA DOR) issued an excise tax advisory (ETA) on rewards programs, specifically (1) the application of "sales price" to select types of rewards program awards, (2) the seller's tax liability when the customer redeems the award for the full price of a good or service, and (3) the tax treatment of reward programs that commingle awards representing taxable consideration and awards representing bona fide discounts. The WA DOR explained that reward programs representing consideration paid by the customer to the seller are not bona fide discounts and must be included in the sales price subject to sales and use tax when redeemed for the seller's goods or service. The WA DOR also considers awards that can be purchased for cash, redeemed for cash or converted to cash to be taxable consideration as cash equivalents. Awards that are bona fide discounts are excluded from the sales price (discount awards) unless the seller receives consideration from a third party as provided under Washington law. Bona fide discount awards include price reductions for a customer's membership in a seller's rewards program. In regard Regarding commingled awards, the WA DOR said sellers have two options: (1) the seller can accurately track the taxable and non-taxable awards until redeemed or (2) if accurate tracking cannot be done, the seller can prepay the tax at the time the award is issued. If one of these options is not followed, the WA DOR will presume these are awards taxable when redeemed. The presumption can be rebutted by a seller that maintains records that identify retail-taxable rewards within the comingled program. When a discount award is redeemed by the customer for taxable items and the seller does not receive additional consideration for the purchase from the customer or a third party, the seller will owe deferred sales/use tax on the item. The ETA includes illustrative examples. The WA DOR noted that this ETA does not address gift cards, gift certificates or discount vouchers redeemed in retail transactions. Wash. Dept. of Rev., ETA 3191.2022 "Rewards Programs" (December 15, 2022).

Sales and Use Tax Exemptions, Exclusions and Refunds

Colorado: The Colorado Department of Revenue (CO DOR) convened a workgroup meeting to discuss the adoption of a new rule to implement HB 22-1118 regarding a buyer's claim for a refund of sales tax paid. HB 22-1118 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 CO DOR on or after July 1, 2022, and before July 1, 2026. The meeting focused on the data, information and documentation a purchaser must provide with a refund claim. For more on HB 22-1118 see EY Tax Alert 2022-0746 (May 10, 2022).

North Carolina: In affirming the final decision of the North Carolina Office of Administrative Hearings, a North Carolina Superior Court found a company that regularly purchased raw materials to create hot mix asphalt it used in fulfilling its existing construction contracts and

sold the remaining amounts to third parties qualified as a manufacturer for purposes of the Mill Machinery Exemption. Thus, the company's out-of-state purchases of raw materials were subject to the lower 1% privilege tax rather than the higher sales or use tax. At issue in this case is whether the company qualified as a "manufacturing industry or plant." The superior court explained that statutory law "did not expressly define the phrase 'manufacturing industry or plant', or, … any variation of the word 'manufacture,'" but case law describes "manufacturing" as "the producing of a new article or use or ornament by the application of skill and labor to the raw materials of which it is composed."[1] The North Carolina Department of Revenue (NC DOR) argued that the company did not qualify as a "manufacturing industry or plant" because it was a contractor and that its creation of hot mix asphalt, by itself, was not enough to transform it into a "manufacturing industry or plant"; rather to qualify for the exemption, the company had to be primarily or principally engaged in the sale of the hot mix asphalt it produced. The company, however, asserted that "as long as it purchased the [tangible personal property] at issue in order to produce [hot mix asphalt] that it then proceeded to use for any business-related purpose, it should be deemed a 'manufacturing industry or plant' for purposes of the exemption." In ruling in favor of the company, the superior court rejected the NC DOR request that this court "infer from the Supreme Court's reasoning in *Clayton-Marcus*[2] a requirement that in order to qualify for the Mill Machinery Exemption a taxpayer must use the purchased tangible personal property to produce a product … for the primary or principal purpose of selling it to third parties." The superior court said it could not find support for the NC DOR's interpretation, further noting that the statutory language for the exemption did not contain such a requirement. The superior court also found that the North Carolina Supreme Court's ruling in *Midrex*[3] suggests a case-by-case approach, rather than an across-the-board approach, of a judicially imposed "primary or principal use" requirement in tax statutes providing special treatment for taxpayers engage in certain activity. Here, the superior court determined that the company manufactured "extremely large" quantities of hot mix asphalt and it did so by utilizing a "manufacturing" process. Accordingly, the company is entitled to the Mill Machinery Exemption. *N.C. Dept. of Rev. v. FSC II, LLC*, No. 22 CVS 5410; 2023 NCBC 9 (N.C. Super. Ct., Wake Cnty., January 30, 2023).

Texas: The Texas Comptroller of Public Accounts (Comptroller) issued a memo summarizing federal statutes and regulations related to Internal Use Software it recognizes as incorporated-by-reference for purposes of the state's franchise and sales/use tax R&D credits under 34 TAC §§ 3.340 and 3.599, following the amendment of these rules in 2022 (hereafter, "current rules"). Tex. Comp. of Pub. Accts., STAR No. 202302001L (February 6, 2023).

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[1] Citing *Duke Power Co. v. Clayton*, 274 N.C. 505, at 513 (N.C. S.Ct. 1968).

[2] *In re Clayton-Marcus Co.*, 286 N.C. 215 (N.C. S.Ct 1974) (taxpayer did not manufacture swatch books it gave to potential customers within the meaning of the exemption).

[3] *Midrex Techs. v. N.C. Dept. of Rev.*, 369 N.C. 250 (N.C. S.Ct. 2016).

Utah: New law (SB 82) directs the State Tax Commission to require a seller to renew an exemption certificate if more than 12 months have passed between transactions between a seller or certified service provider and purchaser. This change is retroactively operational to Jan. 1, 2023. Utah Laws 2023, SB 82, signed by the governor on March 17, 2023.

Virginia: In response to a ruling request, the Virginia Department of Taxation said that the sales and use tax exemption under Va. Code § 58.1.609.10 applies to prescription pet food sold on a veterinarian's prescription or dispensed to patients within a veterinarian-client-patient relationship. The exemption also applies to a veterinarian's purchase of prescription pet food. Va. Dept. of Taxn., Rul. of the Tax Comm. No. 22-159 (December 20, 2022).

Transactions and Services

Alabama: Contracts a company entered-into with several convenience stores (the "proprietors") for placement, servicing and maintaining "bona fide coin-operated amusement machines" in the proprietors' location in exchange for a share of net revenue from the machines constituted joint ventures rather than rental agreements. In so holding, the Alabama Tax Tribunal citing *Birmingham Vending*,[4] found the following contract provisions supportive of this conclusion: (1) the specification that the company is in business of providing, leasing, renting, operating, servicing, maintaining and repairing machines; (2) that it is mutually beneficial for each party entering into the agreement for the placement, servicing and maintaining of the machines at the proprietors' locations; and (3) that the company and proprietors share the responsibilities for and control of the machines as well as the revenue. Because the company was part of a joint venture, it, along with the proprietors, is liable for sales tax. The Tribunal further found that the Alabama Department of Revenue is permitted to assess the company for sales tax on 100% of the gross receipts, but again citing *Birmingham Vending*, noted that "the better practice would be to include both parties to the joint venture on the assessment." The Tribunal also determined that tax should be calculated on the total wagers placed using the machines. *Pinnacle Amusement, LLC v. Ala. Dept. of Rev.*, Dkt. No. S. 19-1105-LP (Ala. Tax Trib. December 29, 2022).

Kentucky: On January 1, 2023, over 30 services became subject to Kentucky's sales and use tax (see, Ky. Laws 2022, HB 8). The Kentucky Department of Revenue is in the process of posting FAQs on these newly taxable services to its website. Recently added FAQs address the following: (1) employer recruitment services, (2) lobbying services, (3) testing services, (4) photography and photo finishing services, (5) massage services, and (6) cosmetic surgery procedures. For a list of the newly taxable services, see EY Tax Alert 2022-0564 (April 6, 2022).

[4] *Birmingham Vending Co. v. State*, 251 Ala. 584, 38 So. 2d 876 (Ala. 1949).

Nevada: The Nevada Tax Commission adopted amendments to regulation NAC 372.390 regarding the imposition of sales and use tax to repair work performed under a contract with the State or political subdivision. The amended regulation provides that a repairer (or a subcontractor of the repairer) who enters into a contract with the State or a political subdivision to perform repair work on, or to maintain property belonging to the State or political subdivision is the consumer of any parts and materials furnished in connection with such work, except if such repairer or subcontractor obtained a permit or registered (or is required to obtain a permit or register) pursuant to a contract with the State or political subdivision. The amended regulation was filed with the Secretary of State on December 29, 2022. Nev. Tax Comm., LCB File No. R174-22 (December 29, 2022).

Texas: The Texas Comptroller of Public Accounts (Comptroller) issued a memo providing guidance on the taxability of credit rating services for legal entities and debt obligations. The Comptroller determined that credit ratings of legal entities are subject to sales/use tax as a credit reporting service, while credit ratings of debt obligations are not taxable. Under Texas law, credit reporting services means the assembly or furnishing of credit history or information relating to any person. A person includes corporations, organizations, governments or governmental subdivisions or agencies, business trusts, estates, trusts, partnerships, associations and any other legal entities. The Comptroller found that credit ratings of legal entities relate to a person but those of a debt obligation do not. The Comptroller said that taxpayers should begin collecting and remitting sales and use tax on their taxable credit rating services starting April 1, 2023. Tex. Comp. of Pub. Accts., STAR No. 202301006L (January 17, 2023).

Utah: Adopted amendments to rule R865-19S-92 clarify that the sale, rental or lease of custom computer software constitutes the sale of a personal service not subject to the state's sales and use tax. This rule change took effect December 13, 2022. Utah Tax Comm'n, R865-19S-92 (Utah State Bull. January 1, 2023 (adopted); Utah State Bull. October 15, 2022 (proposed)).

Technology and Digital Taxes

Washington: The Washington Department of Revenue adopted amendments to WAC 458-20-145 regarding the sourcing of sales of tangible personal property (TPP), retail services, extended warranties, digital products, digital codes and leases of TPP for state and local retail sales tax and business and occupation tax, and determining where the use occurred for purposes of sourcing state and local use tax. The rule is divided into the following parts: (1) general information; (2) general sourcing rules for most retail sales of TPP, extended warranties, digital products, digital codes, and other retail services; (3) special sourcing rules for retail sales of certain goods and services; (4) sourcing rules for leases and rentals of TPP; and (5) sourcing rules for use tax purposes (use tax sourcing rules vary depending on the object of use). The rules include illustrative examples and define various terms. In regard to the

sourcing of digital products and codes, the rule provides guidance on general application to sales of such and references WAC 458-20-15503, which provides extensive guidance on sourcing sales of digital products and codes and sales that are unique to them. There are special sourcing rules for retail sales of the following: (1) watercraft; (2) modular, mobile and manufactured homes; (3) motor vehicles, trailers, semi-trailers and aircraft that do not qualify as transportation equipment; (4) florist sales; and (5) telecommunications services and ancillary services. The rule changes are effective January 9, 2023. Wash. Dept. of Rev., WAC 458-20-145 (adopted December 9, 2022).

Controversy and Compliance

Arkansas: New law (HB 1435) modifies prepayment of sales and use tax to require registered retailers that as of July 1, have average net sales of $200,000 per month for the prior fiscal year (changed from calendar year) that began on July 1 and ended June 30, to prepay sales tax by electronic funds transfer. Such prepayment must begin by the following January 1. The legislature, in the bill's emergency clause, stated that it found "that the current method for calculating the prepayment requirements for sales and use tax does not provide adequate time for businesses to ensure their compliance and inadvertently puts businesses in an untenable position of being unable to properly comply with exiting tax law." The law change takes effect July 1, 2023. Ark. Laws 2023, Act 193 (HB 1435), signed by the governor on March 6, 2023.

Colorado: The Colorado Department of Revenue adopted new Rule 43-4-218 "Retail Delivery Fees" and amendments to Rule 39-21-116.5 "Penalties for Officers or Members". New Rule 43-4-218 sets forth how the retail delivery fee is collected, administered and enforced. As of July 1, 2022, retailers doing business in the state that make retail deliveries have been required to add the retail delivery fee to the price of a retail delivery. The rule provides guidance on the following: (1) imposition and sourcing of the fee; (2) deliveries of tangible personal property not subject to or exempt from the retail delivery fee; (3) contractors and repair services, including time and materials contractor, lump-sum contractors, suppliers to contractors; (4) deliveries of marijuana; (5) registration; (6) collection and remittance of the retail delivery fee; (7) refunds and credits of the retail delivery fee; and (8) calculation and publication of the retail delivery fee. Rule 39-21-116.5 is amended to add the retail delivery fee and the daily vehicle rental fee to the list of fees the penalty for officers or members applies. Colo. Dept. of Rev., Rules 43-4-218 and 39-21-116.5 (adopted February 14, 2023). In addition, the Colorado Legislature is considering bills that would: (1) repeal the retail delivery fee (HB23-1166) or (2) modify the retail delivery fee by creating an exemption from the retail delivery fee by a business that has $500,000 or less of retail sales in the prior year or is new and it would allow a retailer to pay the fee on behalf of the purchaser, among other proposed changes (SB23-143).

Colorado: Effective January 1, 2023, Colorado imposes a 10-cent per carryout bag fee on most retail businesses.[5] For the first phase of the fee, which runs January 1, 2023 to December 31,

[5] Colo. Laws 2021, ch. 440 (HB 21-1162), enacted July 6, 2021.

2023, a store may furnish a recycled paper carryout bag or a single-use plastic carryout bag to a customer if the customer pays a fee of 10 cents per bag, or a higher fee adopted by the municipality or county in which the store is located. The fee also applies to bags used for deliveries. Beginning January 1, 2024, the fee remains in place, but the store may only furnish a recycled paper carryout bag. Plastic bags used for carryout or delivered goods will not be allowed in the state after that date. Although the bag fee is imposed on a state-wide basis, the bag fee is to be remitted locally to cities and counties rather than to the state. Under the new law, 60% of the carryout bag fee revenues will go to the municipality where the store is located (or the county if not located in a municipality); the remaining 40% may be retained by the retailer. This system is likely to create compliance challenges for some companies. The fee itself is not subject to sales tax or otherwise includable in the sales tax base. For sourcing, retailers that make deliveries using plastic or paper bags will need to remit the fee based on the address where the order is delivered, not where it originates. As such, it is crucial that retailers confirm the bag fee in municipalities where they operate, as it may be higher than 10 cents, if raised by ordinance or resolution. For additional information on this development, see EY Tax Alert 2023-0065 (January 10, 2023).

District of Columbia: Emergency law (B24-1160), the "Tourism Recovery Tax Emergency Amendment Act of 2022" temporarily increases the rate of the additional sales and use tax imposed on gross receipts for transient lodgings or accommodations. Effective for the period beginning April 1, 2023 to March 31, 2027 the rate of tax is increased to 1.3% (from 0.3%). D.C. Laws 2022, A24-0703 (B24-1160), signed by the mayor December 22, 2022; expires March 22, 2023. A temporary act, B24-1161, which would be effective for 225 days, has been sent to the mayor; once approved by the mayor, the temporary act will be sent to Congress for a mandatory 30-day review period. The District of Columbia Office of Tax and Revenue previously had issued a notice explaining the temporary increase, noting that for bookings made before April 1, 2023, but not fully paid by that date, the increased rate would apply to payments received on or after April 1, 2023. The rate remains 14.95% for bookings made and fully paid before April 1, 2023, even when the transient accommodations is furnished on or after April 1, 2023. D.C. OTR, Tax Notice 2023-01 (February 13, 2023).

Illinois: The Illinois Department of Revenue adopted amendments to various Retailers' Occupation Tax regulations, notably to 86 Ill. Adm. Code 270.115 Home Rule Municipal Retailers' Occupation Tax, to "provide uniformity among the various sourcing rules." The requirements in Section 270.115 apply to other Retailers' Occupation taxes. The changes include "clarifying" that the sourcing rules described within the section do not apply to remote retailers and marketplace facilitators except as specifically provided. Accordingly, businesses making sales into Illinois as either remote retailers or marketplace facilitators need to pay close attention to the new application of the sourcing rules, given the potential impact on rate determination. The changes also may retroactively impact sourcing for leasing, installment and conditional sale transactions in the state. For a detailed discussion of the changes, *see* EY Tax Alert 2023-0605 (March 29, 2023).

North Carolina: In response to a private letter ruling request, the North Carolina Department of Revenue (NC DOR) determined that a company operating a non-public online platform that (1) enables participating entities to list their inventory of parts on the platform, and allows qualified customers with log-on credentials to view and order inventory, but (2) does not process payments for such items or make a payment processing service available, is not a marketplace facilitator because it does not meet both parts of the definition of a marketplace facilitator. The NC DOR explained that while the company lists or otherwise makes available for sale a marketplace seller's items through a marketplace it owned or operated, neither the company nor its affiliates process payments for such items. Rather an independent party processes qualified customers' payments and makes payment processing services available. N.C. Dept. of Rev., SUPLR 2022–0008 (December 9, 2022).

South Dakota: New law (HB 1137) temporarily reduces the State's sales and use tax rate from 4.5% to 4.2%, effective July 1, 2023. The reduced rate applies to: (1) sales of tangible personal property of goods, wares or merchandise; (2) gross receipts from engaging or continuing in various businesses and services; (3) gross receipts of any person engaging in oil and gas field services; (4) gross receipts from sales, furnishing or services of gas, electricity and water; (5) sales and uses of intrastate, interstate or international telecommunications services that originate or terminate in the state and billed or charged to a service address in this state; (6) sales and use of mobile telecommunications services; (7) tickets or admission to places of amusement and athletic contests or events; (8) transportation of passengers; (9) services used in the State; (10) use of rented tangible personal property and products transferred electronically; (11) use of any transportation of passengers; (12) use of ancillary services; (13) sale, resale or lease of farm machinery, attachment units and irrigation equipment used exclusively for agricultural purposes; (14) operation of any mechanical or electronic amusement device; and (15) renting rental vehicles. The rate reduction provisions are repealed on June 30, 2027; after the repeal, the sales and use tax rate will revert back to 4.5%. S.D. Laws 2023, HB 1137, signed by the governor on March 21, 2023.

Texas: The Texas Comptroller of Public Accounts (Comptroller) has updated the date on which taxpayers should begin collecting and remitting sales and use tax on their taxable credit rating services to July 1, 2023 (from April 1, 2023). Comptroller memo, STAR No. 202302004L (February 17, 2023), provides guidance on the taxability of credit rating services for legal entities and debt obligations. The Comptroller determined that credit ratings of legal entities are subject to sales/use tax as a credit reporting service, while credit ratings of debt obligations are not taxable. Under Texas law, credit reporting services means the assembly or furnishing of credit history or information relating to any person. A person includes corporations, organizations, governments or governmental subdivisions or agencies, business trusts, estates, trusts, partnerships, associations and any other legal entities. The Comptroller found that credit ratings of legal entities relate to a person but those of a debt obligation do not. The Comptroller said that taxpayers should begin collecting and remitting sales and use tax on their

taxable credit rating services starting July 1, 2023. Tex. Comp. of Pub. Accts., STAR No. 202302004L (February 17, 2023) (supersedes STAR No. 202301006L (January 17, 2023)).

Texas: The Texas Comptroller of Public Accounts (Comptroller) posted frequently asked questions regarding the sales and use tax collection, reporting and remitting obligations for remote sellers, marketplace sellers and marketplace providers. The Comptroller said that a seller, depending on its activities, could be a remote seller, a marketplace seller, a marketplace provider, or a combination of the three. The FAQs describe remote sellers, marketplace sellers, and marketplace providers and the safe harbor provisions that apply to remote sellers and marketplace providers. Regarding remote sellers, the FAQs describe their state and local sales and use tax collection obligations, including when the remote seller sells its products through a marketplace; when a remote seller can terminate its Texas use tax collection responsibilities; and how a remote seller can elect to use the single local use tax rate. For Texas sellers, the FAQs explain reporting requirements if the seller makes sales through a marketplace. As for marketplace providers, the FAQs make clear that they cannot use the single local use tax rate, and that marketplace providers, along with marketplace sellers, are subject to audit. Tex. Comp. of Pub. Acct., STAR System No. 202301002L (January 5, 2023).

Texas: The Texas Comptroller of Public Accounts (Comptroller) has adopted amendments to rule 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." In September 2022, the Comptroller issued proposed amendments to Section 3.334(b)(5) and other parts of the rule "with an explanation that augments" those published in the proposed rulemaking (January 2020) and the notice adopting the amendments (May 2020). Based on feedback, the Comptroller made changes to the proposed text published in September 2022. Adopted amendments modify the definition of "fulfill" under Section 3.334(a)(9) to mean "[t]o complete an order by transferring possession of a taxable item to a purchaser, or to ship or deliver a taxable item to a location designated by the purchaser." (The prior rule defined "fulfill" to mean "[t]o complete an order by transferring a taxable item directly to a purchaser at a Texas location, or to ship or deliver a taxable item to a location designated by the purchaser.") The Comptroller said this change is intended to make the language more consistent with Tex. Tax Code §321.203(c-1). The definition of "place of business of the seller" in Section 3.334(a)(16) has been amended to make clear that a place of business of the seller must 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 usually requires it be staffed by at least one sales

personnel. (The Comptroller noted that it added the word "usually" to clarify that the presence of sales staff is an important factor in determining whether an outlet, office or location is a place of business, but such presence is not required.) The "purpose" element can be established by showing that the sales personnel received three or more orders for taxable items at the facility during the calendar year. Adopted amendments to Section 3.334(b)(1)(A) provide that the forwarding of previously received orders to the facility for fulfilment does not make the facility a place of business.

The Comptroller also adopted proposed amendments to Sections 3.334(b)(4) and (5), with modifications from the proposed language for Subsection (b)(5). As amended 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 "a facility without sales personnel is usually not a 'place of business of the seller'." For example, vending machines, a computer that operates an automated shopping cart software program, and a computer that operates an automated telephone ordering system are not "an established outlet, office, or location" and, therefore, they do not constitute a "place of business of the seller." A walk-in retail outlet with a stock of goods for immediate purchase through a cashier-less point-of-sale terminal, however, is "an established outlet, office, or location" and, as such, constitutes a "place of business of the seller" even though sales personnel are not required for each sale.

In Section 3.334(c)(2)(B)(ii), the term "order not fulfilled in Texas" is amended to make the language more consistent with Tex. Tax Code §321.205(c). The amended rule provides 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, is consummated at the first point in Texas where the item is stored, used or consumed after interstate transit has ceased. There is a rebuttable presumption that a taxable item delivered to a point in Texas is for storage, use or consumption at that point. Local use tax would be collected as provided in Section 3.334(d).

The amended rules took effect January 30, 2023.

Utah: New law (SB 121) establishes provisions relating to the administration and taxation of car-sharing business platforms. Sales and use tax is imposed on car sharing; however, when the shared vehicle owner certifies to the commission that the shared vehicle is an individual-owned shared vehicle, sales and use tax does not apply to car sharing, a car-sharing program, a shared vehicle driver or a shared vehicle owner. This exception also applies to certified individual-owned shared vehicles that are shared through a car-sharing program that also shares non-certified vehicles. If a car-sharing program relies in good faith on a shared vehicle owner's representation that the shared vehicle is an individual-owned shared vehicle certified with the commission, the car-sharing program is not liable for any tax, penalty, fee or other

sanction imposed on the shared vehicle owner. Provisions of SB 121 also prohibit counties, municipalities and other political subdivisions from imposing a tax, fee or charge on the gross proceeds or gross income of a car sharing transaction that the jurisdiction does not impose on other transactions involving the rental or a motor vehicle without a driver. These changes take effect July 1, 2023. The following changes have retrospective operation to January 1, 2019 for a transaction that is the subject of an appeal pending on or filed after January 1, 2023: (1) the definition of "short-term rental" is amended to exclude car sharing; and (2) beginning on July 1, 2023, if (i) a county legislative body or any county imposes a tax on short-term motor vehicle rentals or (ii) the motor vehicle rental tax is imposed, a tax at the same rate applies to car sharing, except for (a) car sharing for the purpose of temporarily replacing a person's vehicle while it is being repaired under a repair or insurance agreement, and (b) car sharing for more than 30 days. Utah Laws 2023, SB 121, signed by the governor on March 17, 2023.

Wyoming: New law (HB 229) clarifies that the Wyoming Department of Revenue may allow taxpayers to submit the return and pay sales and use tax due electronically. The law also provides that the county treasurer may allow taxes to be paid electronically and it can charge a fee to recoup fees incurred due to the electronic payment. These provisions take effect July 1, 2023. Wy. Laws 2023, ch. 123 (HB 229), signed by the governor on February 27, 2023.

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