State Tax Alert
April 2024

State Sales and Use Tax Quarterly Update – April 2024

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 target business inputs and services as a means to expand the sales tax base

Approximately two-thirds of state-level tax revenue is derived from individual income and sales and use taxes – with individual income taxes generating slightly more than sales and use taxes.[1] However, while revenue from general sales and use taxes has remained fairly constant since 2019, revenue from individual income taxes has fluctuated, year-over-year, by as much as 30 percent.[2] Given that one of the main goals for state government planners is to achieve consistency in tax revenue, it is not surprising that there has been a renewed focus on sales and use taxes at both the state legislative and administrative levels.

One of the more attractive features to state governments of indirect taxes, such as the sales and use tax, is that its impact – if not its effects – are less noticeable to taxpayers. This is especially true when the taxes are not applied directly to consumer goods and services, but rather to transactions that occur further down the supply chain. Stated differently, while indirect taxes may be applied in a manner that ultimately raises the overall economic cost to the consumer, it may do so in a manner that is less transparent and, therefore, less politically sensitive.

Recently, a number of state governments have sought to put this principle into effect by expanding indirect taxes to cover certain enumerated services and business inputs. Most notably, Maryland has imposed a new tax on digital advertising services that may not be visibly passed on to the consumer, but which undoubtably raises their overall cost. Meanwhile, across the Potomac River in Virginia, the State's General Assembly passed a broad tax on digital services, including: software application services (SaaS); computer-related services; website hosting and design; data storage; and streaming services. And, while only the SaaS component is deemed taxable for businesses as well as individual consumers, that provision alone is likely to have a significant impact on overall business costs.

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[1] *See* U.S. Census Bureau Annual Survey of State Government Tax Collections (STC) at census.gov/programs-surveys/stc.html.
[2] *Id.*

While such expansion of indirect taxes is by no means uniform among the states, it has become a more regular practice, and many more states can be expected to consider similar tax policy. Accordingly, businesses should continue to monitor state legislative sessions in the near term.

Our Observation: State governments are not just realizing the revenue potential that indirect taxes in general – and sales and use tax in particular – possess. Until recently, however, legislatures were wary of expanding the scope of such taxes to apply broadly to services and business inputs. Indeed, prior efforts to do so have been met with strong taxpayer resistance, leading state tax administrators to rethink their approaches. However, in the current inflationary environment, where cost increases to businesses and consumers are almost expected, taxpayers should expect more states to strongly consider – if not rapidly enact – new indirect taxes and sales and use tax base expansions to cover transactions that historically were not subject to tax.

Other Recent Sales and Use Tax Developments

Nexus and Marketplace

Colorado: The Colorado Department of Revenue issued a general information letter discussing when a retailer that does not collect Colorado sales tax (i.e., noncollecting retailer) who does not (1) maintain a place of business in Colorado or (2) solicit business in Colorado and make sales into the state sufficient to meet the economic nexus threshold, is required to comply with the state's sales and use tax notice and reporting requirements. Under these requirements, a noncollecting retailer must notify Colorado purchasers that sales and use tax is due on certain purchases they made from the retailer and that they are required to file a sales or use tax return. Colo. Dept. of Rev., GIL 24-002 (March 4, 2024).

Colorado: In response to a ruling request, the Colorado Department of Revenue (CO DOR) determined that an online marketplace's charges for a subscription-based membership the primary benefit of which provides the purchaser with unlimited free delivery on certain orders is not subject to the state's sales and use tax. The CO DOR explained that Colorado only taxes specifically enumerated services and that transportation services, including delivery servicers, are not listed as a taxable service. The charge for transportation/delivery services are not subject to tax if they are separable from the sales transaction and separately stated on the invoice or contract. A service is separable from the sales transaction when the nature of the service remains the same whether contracted at the time of purchase or later, and the service can be contracted for at the initial purchase or later. In this instance, the online marketplace's charge is separately invoiced and the charge for the membership is separable because the nature of the delivery and other services provided in exchange for the membership remains the

same whether contracted for and the time of purchase or later. Colo. Dept. of Rev., PLR 23-006 (Dec. 1, 2023).

Florida: The Florida Department of Revenue (FL DOR) issued guidance on when a merchant is responsible for remitting sales and use tax when it uses a third-party delivery network company. If the third-party delivery network company does not elect to collect tax on behalf of the merchant, the merchant is responsible for collecting, reporting and remitting tax. The FL DOR suggested that to avoid sales tax compliance issues, local merchants that use third-party delivery network companies should review the terms of their agreements regarding sales tax collection and remittance responsibilities and the effective date of any changes related to those responsibilities. Fla. Dept. of Rev., Tax Information Publication No. 23A01-24 (Dec. 15, 2023).

Indiana: New law (SB 228) modifies the economic nexus provisions by eliminating the 200 or more separate transactions thresholds, retroactively effective on Jan. 1, 2024. As modified, economic nexus will be established by a retail merchant that does not have a physical presence in the state when the merchant's gross revenue from any combination of sales of tangible personal property delivered into the state, product transferred electronically into the state or a service delivered into the state, exceeds $100,000 for the calendar year in which the transaction is made or the calendar year preceding such transaction. Effective Jan. 1, 2025, the law allows a retail merchant that receives at least 75% of its receipts from sales of prepared food to elect to claim a sales tax exemption equal to 50% of the tax imposed on transactions involving electricity. The exemption applies to such electricity purchased by the retail merchant through a single meter. The election must be submitted on a form provided by the Indiana Department of Revenue. The election is irrevocable for any period for which the exemption has already been claimed, but it can be withdrawn prospectively. Ind. Laws 2024, P.L. 118 (SB 228), signed by the governor on March 13, 2024.

Wyoming: New law (HB 197) modifies the remote seller threshold by eliminating the 200 separate transaction threshold; thus, remote sellers will create nexus if their gross revenues from the sale of tangible personal property, admissions or services delivered into this state exceed $100,000. In addition, the law amends the definition of "vendor" to clarify that a person is not in the business of selling if selling taxable tangible personal property, admissions or services is not a habitual or regular activity of the person. The sales and use tax exemption for sales of power or fuel is revised to apply to a person transporting tangible personal property by railroad or by pipeline when the power or fuel is consumed directly in generating motive power for actual transportation (changed from sales to a person engaged in the transportation business when the same is consumed directly in generating motive power for actual transportation). In addition, the law adjusts vendor credit provisions. As modified, a credit equal to 1.95% of the amount of tax due, up to $500 in any month, is available to the vendor or direct payer for paying tax due on or before the 15th day of the month the taxes are due. These changes, as well as other changes in HB 197 not discussed in this summary, take effect on July 1, 2024. Wyo. Laws 2024, ch. 67 (HB 197), signed by the governor on March 8, 2024.

Tax Base and Taxability

Colorado: In response to a ruling request, the Colorado Department of Revenue (CO DOR), determined that the delivery fee (which is waivable) charged by a national online retail seller of used motor vehicles is not subject to the state's sales and use tax. The CO DOR explained that transportation of tangible personal property between the retailer and purchaser generally is not a taxable service if the service is separable from the sales transaction and the service charge is separately stated on the written invoice or contract. A service is separable from the sales transaction when the nature of the service remains the same whether contracted at the time of purchase or later, and the service can be contracted for at the initial purchase or later. The CO DOR noted that in the case of transportation services, they are separable from the sales transaction if the service is performed after the tangible personal property or service is offered for sale and the seller allows the purchaser to use either the seller's or an alternative transportation service. Colo. Dept. of Rev., PLR 23-007 (Nov. 29, 2023).

Idaho: New law (HB 527), effective July 1, 2024, amends the definition of "drugs" to make clear that "drugs" do not include "articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in animals other than man." Id. Laws 2024, ch. 69 (HB 527), signed by the governor on March 18, 2024.

Illinois: The Illinois Department of Revenue (IL DOR) has determined that federal clean vehicle credits applied toward the purchase price of a clean vehicle are included in the taxable selling price of the vehicle under the Retailers' Occupation Tax (ROT). The federal Inflation Reduction Act of 2022 established a federal income tax credit for eligible purchases of qualifying new or used clean vehicles (i.e., certain electric vehicles), plug-in hybrids and fuel cell vehicles – the clean vehicle credit. Applicable to clean vehicles purchases on or after Jan. 1, 2024, a purchaser can transfer their clean vehicle credit to the qualifying new or used vehicle dealer in exchange for a payment from the dealer. The payment can be in the form of a cash payment to the purchaser or a payment applied to the purchase price of the vehicle. Payments applied to the purchase price of the clean vehicle are included as taxable consideration for the sale of the vehicle. The IL DOR explained that the payment toward the purchase price of the clean vehicle is like manufacturer rebates or manufacturer-reimbursed coupons. Thus, payments applied to the purchase price of the clean vehicle are included in taxable gross receipts under the ROT. Ill. Dept. of Rev., Informational Bulletin "Illinois Sales Tax Treatment of Point-of-Sale Transfer of Federal Clean Vehicle Tax Credits" (Feb. 2024).

New Mexico: On March 6, 2024, Governor Michelle Lujan Grisham signed into law an omnibus tax bill, HB 252 (ch. 67), which expands the gross receipts tax deduction to include sales of energy storage equipment to a government. Specifically, for periods before July 1, 2034, taxpayers may deduct from gross receipts, receipts from selling (1) wind or solar generation equipment or (2) energy storage equipment or related equipment, to a government for the

purpose of installing a wind or solar electric generation facility or an energy storage facility, respectively. Starting Jan. 1, 2025, receipts from the following may be deducted from gross receipts in computing compensating tax due: (1) selling tangible personal property (TPP) installed as part of, or services rendered in connection with, constructing and equipping a geothermal electricity generation facility; (2) selling TPP installed as part of a system used for the distribution of electricity generated from a geothermal electricity generation facility; and (3) selling or leasing TPP or selling services that are construction of plant costs. The deduction is available before July 1, 2032, and only for sales made to a person holding an interest in a geothermal electricity generation facility and who gives an appropriate nontaxable transaction certificate to the seller or lessor or provides alternative evidence.

Ohio: The Ohio Department of Taxation (OH DOT) determined that when a customer who purchased a new or used Electric Vehicles (EVs) or Fuel Cell Vehicles (FCVs) elects to transfer the federal Clean Vehicle Tax Credit to a motor vehicle dealer and the sale is reported to the IRS, the credit is included in the taxable price of the new and used vehicles for sales and use tax purposes. The OH DOT explained that since the seller is reimbursed for the credit by the IRS, which constitutes consideration received from a third party, the credit does not reduce the price of the vehicle being purchased. Ohio Dept. of Taxn., ST 2023-02 "IRS Clean Vehicle Tax Credit" (Dec. 18, 2023).

Texas: In response to a ruling request, the Texas Comptroller of Public Accounts (Comptroller) provided guidance on the tax treatment of charges for participating in a carbon offset credit program offered by the taxpayer, who sells natural gas to residential and nonresidential customers. The taxpayer purchases carbon offset credit certificates from third parties that verify and retire carbon offset credits; certificates are verifiable emission reductions from certified climate action projects to compensate for emissions made elsewhere (such as residential or commercial natural gas usage). The taxpayer's charge to its customers for the customer's natural gas usage is not impacted by a customer's participation in the program. Customers choose a percentage of carbon emissions related to their natural gas usage to offset and either pay a fixed amount (residential customers) or pay a fixed rate per natural gas mcf (commercial customers). The Comptroller determined that the taxpayer's program charge is subject to sales and use tax as part of the sales price of natural gas. The Comptroller reasoned that since the program charge is a charge to offset the carbon emissions of natural gas purchased by a customer, the charge is an expense related to the customer's purchase and consumption of gas. Thus, the charge is an expense included in the sales price of the natural gas. Program charges to residential customers, however, are exempt from state sale and use tax. Nevertheless, such charges could be subject to local sales and use taxes, depending on the taxing jurisdiction. Program charges to commercial customers are subject to state and local sales and use taxes unless a properly completed exemption certificate is provided by the customer. (Under Texas law, the sale of natural gas for residential use is exempt from state sales and use tax, while such sales for commercial use are taxable unless otherwise exempt.)

The Comptroller also found that Program charges are includable in gross receipts for the miscellaneous gross receipts tax (MGRT), which is imposed on a utility company that makes a sale to an ultimate consumer. The Comptroller explained that the taxpayer's sale of credits to offset emissions are directly related to providing electricity or gas and, therefore, are in includable in gross receipts for purposes of the MGRT. Tex. Comp. of Pub. Accts., PLR No. 20230515102255 (Dec. 29, 2023).

Sales and Use Tax Exemptions, Exclusions and Refunds

Colorado: On Jan. 2, 2024, the Colorado Department of Revenue (CO DOR) adopted a sales tax rule, Rule 39-26-703-2 "Buyer's Claims for Refund of Sales or Use Tax Paid" (hereafter, final rule), to implement law enacted in 2022 (HB 22-1118), that impose significant new penalties on refund claims for sales and use taxes paid by a purchaser to a vendor. (See EY Tax Alert 2022-0746 May 10, 2022) The final rule prescribes the form for making a refund application for sales or use taxes and the data, information and documentation an applicant must provide, and it provides guidance on protective refund claims for sales and use tax paid to the seller and the penalty imposed for incomplete refund claims. Applicants must comply with the requirements of this rule for refund claims filed after the rule's effective date of March 1, 2024.

Illinois: The Illinois Department of Revenue (IL DOR) adopted amendments to Retailers' Occupation Tax rolling stock regulation, 86 Ill. Adm. Code 130.340, to restructure the rule and implement law changes that established a new rolling stock test for motor vehicles and trailers, among other modifications. The rolling stock exemption is available to (1) purchasers that are interstate carriers for hire and otherwise meet the requirements of the exemption and (2) lessors that lease to interstate carriers who use the property as rolling stock moving in interstate commerce and to shippers. In determining eligibility for the rolling stock exemption, the item must meet the following conditions in each instance: (1) it must transport persons or property for hire, and (2) it must transport persons or property in interstate commerce. Items that do not meet both criteria are not eligible for the exemption. The amended regulation modifies the definition of "rolling stock" to expand the list of examples of "interstate transportation company for hire" to include barge and limousine companies (in addition to railroads, bus lines, airlines and trucking companies) and the list of examples of exempt equipment to include shipping containers transferred at intermodal terminal facilities or commercial service or cargo service airports. The adopted amendments define additional terms, including "motor vehicle", "aircraft", "limousine", "trailer", and "watercraft". Generally, the rolling stock exemption cannot be claimed by a purely intrastate carrier for hire, but can be claimed by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports for hire persons or property whose journey/shipment originate or terminate outside Illinois. The amended regulation sets forth the specific requirements motor vehicles (other than limousines) and trailers, as well as repair and replacement parts for such, must meet to qualify for the rolling stock exemption, with separate rules for motor vehicles, trailers and

repair/replacement parts for such purchased (1) on or after Aug. 14, 2017, and (2) before Aug. 14, 2017. The amended regulation also sets forth the requirements limousines, aircraft, watercraft, and repair and replacement parts for such, must meet to qualify for the rolling stock exemption. The amended regulation includes numerous examples. The IL DOR also adopted amendments to rolling stock language, as well as other provisions, in regulations 86 Ill. Adm. Code 140.201 and 150.701. The amended regulations took effect Jan. 18, 2024. Ill. Dept. of Rev., 86 Ill. Adm. Code 140.201 and 150.701 (Ill. Register, Vol. 48, Issue 5, Feb. 2, 2024).

Indiana: A finance company is entitled to a sales tax refund on bad debt calculations that reflected the federal market discount rules to value repossessed property. In so holding, the Indiana Tax Court rejected the Indiana Department of Revenue's assertion that the state's bad debt statute required the taxpayer to reduce its adjusted basis by subtracting the full amount of the repossessed property, not merely a fraction of it. *Indiana Finance Financial Corp. v. Ind. Dept. of Rev.*, Case No. 20T-TA-00017 (Ind. Tax Ct. Jan. 4, 2024).

Michigan: The Michigan Department of Treasury (MI DOT) issued a notice regarding changes to the sales and use tax treatment of food for human consumption. Under Michigan law, food and food ingredients are exempt from tax, while prepared food is generally subject to tax. Starting Feb. 13, 2024, the definition of "prepared food" is expanded to include food sold with eating utensils provided by the seller. The notice explains that the general standard for what constitutes a utensil "provided by the seller"—i.e., an eating utensil is 'provided by the seller' only if the seller puts the utensil in a food item's packaging, gives or hands a utensil to a purchaser, or makes available a utensil necessary for the purchaser to receive food—applies to a seller whose "prepared food sales percentage" does not exceed 75%. When the seller's "prepared food sales percentage" is over 75%, the seller is subject to the general standard and, starting Feb. 13, 2024, they are also subject to a special standard"—i.e., that a utensil is "provided by the seller" when a seller makes an eating utensil available. The notice also describes what prepared food is and is not. Under Michigan law, there are three categories of "prepared food": (1) food sold in a heated state or that is heated by the seller; (2) two or more food ingredients mixed/combined by the seller for sale as a single item; and (3) food sold with eating utensils provided by the seller (with an extended discussion on this provision). The MI DOT indicated that it will be issuing a new Revenue Administrative Bulleting on this topic to replace RAB 2022-4. Mich. Dept. of Treas., Notice Regarding Changes to the Tax Treatment of "Prepared Food" (Jan. 25, 2024).

Oklahoma: New law (HB 1955) eliminates the excise tax on all retail sales of food and food ingredients sold for human consumption off the premises where sold. Specifically, on or after the effective date of this act, the rate of the excise tax imposed on such food and food ingredients will be zero percent. Local sales and excise taxes still apply to sales of food and food ingredients. Further, until June 30, 2025, if a county or municipality submits a question of sales or excise tax to its voters, it must provide that the increased rate does not apply to "food and food ingredients". "Food and food ingredients" mean substances sold for human

consumption for their taste or nutritional value, and the term includes bottled water, candy and soft drinks. "Food and food ingredients" do not include alcoholic beverages, dietary supplements, marijuana (as well as usable marijuana and marijuana-infused products), prepared food or tobacco. The law also added definitions of the following terms: "alcoholic beverages", "candy", "dietary supplements", "prepared food" and "soft drinks". The law takes effect 90 days after the session adjourns sine die. Okla. Laws 2024, ch. 2 (HB 1955), signed by the governor on Feb. 27, 2024.

South Carolina: In response to a ruling request, the South Carolina Department of Revenue (SC DOR) found that sales and rentals of digital textbooks (or eTextbooks) are exempt from the state's sales and use tax under S.C. Code Section 12-36-2120(3)(a). The SC DOR noted that there is not a limitation on what form a textbook must take in order to qualify for the textbook exemption, and that "textbook" for purposes of the exemption "can include additional alternate forms of the traditional printed textbooks beyond those specifically enumerated by statute and regulation, so long as the alternate form is purchased for the same use, and contains the same information which is being taught, as a traditional printed textbook and are used as a part of a prescribed course of study." The SC DOR also considered whether charges for the eTextbook are taxable communications services. In applying the "true object" text, the SC DOR determined that students who purchase eTextbooks are paying for a "textbook" in a digital format and not for access to or use of a communications system. Thus, eTextbooks are not charges for taxable communications services. S.C. Dept. of Rev., Private Letter Ruling #24-2 (March 18, 2024).

Washington: The Washington Department of Revenue adopted amendments to WAC 458-20-18801 regarding medical substances, devices and supplies for humans, adding a provision on mobility enhancing equipment under the complex needs patient exemption. As of Aug. 1, 2023, Washington sales and use tax does not apply to the sales or use of mobility enhancing equipment when it is purchased for or used by a complex needs patient. The exemption applies to mobility enhancing equipment that meets the user's specific and unique medical, physical or functional needs and capacities for basic activities when medically necessary to prevent hospitalization or institutionalization of a complex needs patient. The regulation defines a "complex needs patient" as "an individual with a diagnosis or medical condition that results in significant physical or functional needs and capacities." The exemption includes repair services and replacement parts for such equipment. To claim the exemption, the buyer must provide the seller with an exemption certificate. The seller must retain a copy of the exemption certificate for its files. The amended regulation takes effect Feb. 23, 2024. Wash. Dept. of Rev., WAC 458-20-18801 (WSR 24-03-133, adopted Jan. 23, 2024).

Wisconsin: New law (SB 791) exempts from sales and use tax the sale of electricity delivered or placed by a (1) Level 3 charger or an electric vehicle (EV) charging station or (2) a Level 1 or Level 2 charger installed on or after March 22, 2024 of an EV charging station, into the battery or other energy storage device of an EV. The law also imposes an excise tax at the rate of three cents per kilowatt-hour on the electricity delivered or placed by a Level 1, 2 or 3

charger of an EV charging station into the battery or other energy storage device of an EV. The tax applies to Level 1 or Level 2 chargers installed on or after March 22, 2024. Tax does not apply to electricity delivered or placed by a Level 3 charge located at a residence. The law sets forth the filing and payment requirements for the excise tax. These tax provisions take effect Jan. 1, 2025. Wis. Laws 2024, Act 121 (SB 791), signed by the governor on March 20, 2024.

Transactions and Services

California: In reversing a lower court ruling, a California appeals court upheld a California regulation (Cal. Code Regs., tit. 18, Sections 1585(a)(4) and (b)(3)) that measures the sales tax on a cell phone purchased as part of a bundled transaction – i.e., a cell phone purchased for significantly less than full price from a wireless service provider when the purchaser also signs a contract to use the provider's wireless services for a period into the future – at the cell phone's unbundled, full price. The court noted that the parties did not dispute whether the cell phone is taxable, but they disagreed on how to measure the payment – thus, finding the issue to be an accounting problem of segregation. While statutory provisions did not provide guidance on this problem, the court found Regulation 1585 does so by "effectively attributing the portion of the contract price that is equivalent to the unbundled sales price to the cell phone, and the rest to the wireless services." The court also rejected the taxpayer's argument that the regulation was not adopted in compliance with the Administrative Procedures Act. *Bekkerman et al. v. California Dept. of Tax and Fee Admin.*, No. C093763 (Cal. Ct. App., 3rd App. Dist., Feb. 27, 2024).

Iowa: In response to a request for a declaratory order regarding the taxability of charges for the installation of qualified manufacturing equipment, either new or used, that is directly used in the manufacturing process, the Iowa Department of Revenue (IA DOR) said that when a business charges for installation of *used* industrial machinery and equipment, the sales price of the installation is taxable. Iowa law (Iowa Code §423.3(48)) specifically exempts from sales tax charges for the installation of *new* industrial machinery or equipment. The IA DOR explained that if the business installs both new and used industrial machinery or equipment, the business must separately itemize the sales price of each installation charge; otherwise, the entire lump-sum invoice billing is subject to tax. If the business bills a single lump-sum that consists only of the sales price of new industrial equipment or machinery and the charge for installation services for such equipment or machinery, sale tax will not be due if it is clear from the invoice that each component of the lump-sum is not taxable. *In the Matter of Performance Contracting Inc.*, Dkt. No. 318637 (Iowa Dept. of Rev. Dec. 8, 2023).

Texas: The Texas Comptroller of Public Accounts (Comptroller) after holding an industry roundtable discussion on flowback and water transfer operations, issued updated guidance on the application of sales and use tax on flowback and water transfer services used at oil and gas well sites to support fracking operations. The Comptroller has determined that flowback and water transfer services, as described in the guidance, are not subject to sales or use tax. In

addition, such services are not one of the listed services subject to the 2.42% oil well servicing tax, unless the company providing the flowback services is also providing the fracking services. The Comptroller noted that a provider of nontaxable flowback and water transfer services must pay tax on all equipment and materials used to perform the service. The Comptroller said that Rule 3.324 will be amended to address these issues. The taxability determination in this guidance will apply beginning with the later date of adoption of the rule amendment or March 1, 2024. The Comptroller also provided guidance for open audits and hearing assignments with these issues, closing out a particular assignment, and application of the new guidance to assignments that were settled. Tex. Comp. of Pub. Accts., STAR No. 202312010L (Dec. 13, 2023) (supersedes STAR Nos. 202302014H (2023), 202110021H (2021), 202008019H (2020) and 202009002L (Sept. 31, 2020) as they relate to equipment provided to control flowback after fracking oil and gas wells).

Technology and Digital Taxes

Georgia: The Georgia Department of Revenue has adopted Rule 560-12-2-.117 regarding the sales and use tax exemption for certain high-technology data center equipment. The rule described the scope of the exemption, which applies to the purchase and use of high-technology data center equipment that is incorporated or used in a high-technology data center when certain conditions are met. A data center owner that holds a high-technology data center exemption can make exempt purchases from the exemption start date through Dec. 31, 2031. The exemption period may be shorter for high-technology data center customers holding an exemption certificate. The rule describes the minimum investment thresholds that must be met to qualify for the exemption, including the required number of new quality jobs and aggregate expenditure requirements. Requirements vary based on the population of the county in which the data center is located. The rule explains the application process for the exemption certificate, and it addresses certain topics related to the exemption certificate such as issuing the certificate, revoking the certificate, claiming the benefit of the exemption, filing an annual report (including the information that must be included in the report), and filing an investment report. The rule also describes the impact holding a valid sale and use tax exemption certificate has on certain income tax credits. Lastly, the rule defines various terms, including: "data center owner", "high-technology data center", "high-technology data center customer", "high-technology data center equipment", "high-technology data center minimum investment threshold", "investment period", "new quality job", and "real property". The rule took effect Feb. 6, 2024.

Michigan: In response to a letter ruling request, the Michigan Department of Treasury (MI DOT) issued a Technical Advice Letter on the sales tax treatment of certain transactions involving software. The taxpayer requesting the ruling is a foreign-based company whose software is hosted on servers located outside the state. The taxpayer sells subscriptions to access its services, which are fundamentally Software as a Service (SaaS), through a web portal or an app to customers in the US. The MI DOT said determination of taxability of computer software "is a

fact-intensive inquiry", requiring each product be analyzed based on the type of software and what is delivered to the customer. The MI DOR explained that if the product is sold without software being downloaded, it does not constitute the sale of prewritten computer software and, thus, is not taxable. When the product is sold as part of a mixed transaction, e.g., there is a sale of prewritten computer software (in this case a downloaded application) along with a sale of nontaxable services, the incidental to the service test will be applied to determine taxability. Based on the facts presented, the MI DOT determined that the taxpayer is charging for services and the downloaded application, which is free of charge, is not useful without also paying for the services. Thus, the transactions at issued are nontaxable services. Mich. Dept. of Treas., Published Tech. Advice Letters "Sales Tax Treatment of Certain Transaction Involving Software" (Jan. 31, 2024).

Washington: The Washington Department of Revenue updated regulation WAC 458-20-15503 "Digital Products" to modify the exemption provision for purchases of standard financial information by qualifying international investment management companies (QIIMC). The amendments (1) expand the exemption to include purchases by persons affiliated with the QIIMC, (2) clarify that the exemption is from sale *and use* tax (new material italicized), and (3) update the exemption sunset date to July 1, 2031 (from July 1, 2021). The amendment revises the definition of a QIIMC to mean a person engaging within Washington in the business of providing qualifying international investment management services as defined in RCW 82.04.293(1). The amended regulation was adopted on Jan. 23, 2024, and become effective Feb. 23, 2024.

Practice, Procedure, Controversy and Compliance

Michigan: The Michigan Department of Treasury issued guidance on sales and use tax sourcing rules for sales of purchases made from outside Michigan. The guidance describes: (1) general sourcing rules for sales of tangible personal property; (2) general sourcing rules for rentals and leases; (3) sourcing rules for rentals and leases of motor vehicles, trailers, semitrailers and aircraft; and (4) sourcing rules for other types of transactions. Mich. Dept. of Treas., RAB 2023-26 "Sales and Use Tax Sourcing" (Dec. 26, 2023).

Minnesota: The Minnesota Department of Revenue (MN DOR) issued guidance on the new retail delivery fee. Starting July 1, 2024, the 50-cent fee applies to each transaction where charges for taxable tangible personal property and clothing equal or exceed $100. In calculating whether a transaction meets the threshold, the transaction includes all charges that are part of the sale, excluding the retail delivery fee. The retail delivery fee: (1) is not subject to sales tax if it is stated separately on the receipt or invoice, (2) applies once per transaction regardless of the number of shipments made, (3) is shone as a separate line item on the receipt, and (4) follows Minnesota sourcing rules. Retailers not liable for the Retail Delivery Fee including retailers whose prior calendar year Minnesota retail sales were less than $1 million, and marketplaces that facilitate sales for a retailer whose prior calendar year Minnesota retail sales

were less than $100,000. Both taxable and nontaxable retail sales are included in the calculation of the retail sales threshold for the retailer exclusion. Charges for certain items, including drugs, medical devices, food and select baby products, are not included in calculating whether the threshold has been met. The retail deliver fee does not apply to: (1) deliveries to a purchaser that is exempt from sales tax, (2) deliveries by motor vehicles with permits issued under Minn. Stat. Ch. 169 or 221, (3) deliveries by a food and beverage service establishment (regardless of who delivers), (4) purchases picked up at the retailer's business location (e.g., curbside delivery); (5) deliveries to locations outside Minnesota. Also not included in determining whether the threshold was met are sales made to retailers for resale purposes, utilities (e.g., natural gas, electricity), and items delivered electronically (e.g., software). The retail delivery fee is not refundable if items are returned. Retailers will need to register for the fee, and they will need to report the fee on the "Retail Delivery Fee" tax line on the Sales and Use tax return. The guidance includes examples of transactions and how the fee is calculated. The MN DOR also said that the retail delivery fee applies even when there is free shipping, and that taxpayers should follow the sales price definition in determining how to handle discounts and coupons when calculating the $100 threshold. Minn. Dept. of Rev., Retail Delivery Fee (last update Feb. 21, 2024).

Missouri: The Missouri Department of Revenue adopted amendments to Missouri regulation, 12 CSR 10-117.100, for determining the applicable local sales or use tax. Generally, when an order is taken outside the state for a sale of taxable tangible personal property, the sale is subject to the local sales tax in effect where title to the item transfers to the purchaser. The amendment provides an exception to this general rule. Under this exception, when the merchandise is shipped from one of the seller's Missouri locations to the Missouri customer the sale is subject to the local sales tax at the location of the Missouri seller from where the merchandise was shipped. The amendment further provides that sales made entirely at a temporary location are subject to local sales tax in effect at that location. The amendment takes effect 30 days after publication in the Code of State Regulations. Mo. Reg., Vol. 49, No. 4, Feb. 15, 2024. (See Mo. Reg., Vol. 48, No. 18, Sept. 15, 2023, for the proposed text, which was adopted without change).

Texas: The Texas Comptroller of Public Accounts (Comptroller) has adopted amendments to local sales and use tax regulation, 34 TAC §3.334, to add a new "general standard" provision regarding the location where an order is received. As amended, the location an order is received by or on behalf of a seller (collectively "by the seller") is the physical location of a seller or third party such as an established outlet, office location or automated order receipt system operated by the seller where an order is initially received by the seller and not where the order may be subsequently accepted, completed or fulfilled. An order is received when the seller receives all of the information from the purchaser necessary to determine whether the order can be accepted. The location of where the product is shipped cannot be used to determine the location where the seller receives the order. The final rule takes effect on Jan. 9, 2024. (49 TexReg 52, Jan 5, 2024).

Utah: New law (HB 32) defines, for sales and use tax purposes, "short-term rental" to mean "a lease or rental for less than 30 consecutive days." The term does not include car sharing. The law also provides that sales and use tax is imposed on short term rentals of tourist homes, hotels, motels or trailer court accommodations and services. (Prior language-imposed sales and use tax on tourist homes, hotels, motels or trailer court accommodations and services regularly rented for less than 30 consecutive days). The definition of "short-term rental" under Utah Code Section 59-12-602(12) "Tourism, Recreation, Cultural, Convention, and Airport Facilities Tax Act" is deleted. HB 32 takes effect July 1, 2024. Utah Laws 2024, HB 32, signed by the governor on March 14, 2024.

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