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“Buyer (and Seller) Beware!
Concepts of the Cloud”

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Abstract

This session will provide a brief overview of the fundamental cloud models and will highlight issues impacting nexus and taxability - including both characterization and sourcing. The session will further explore issues impacting both the buyer and seller, including how to handle conflicts of state laws in relation to nexus, characterization of services, situsing, including multi-state use, and application of exemptions (both traditional and new) to these unique business models.
ALABAMA

Tax Applies to Rental of Digital Transmissions - Effective October 1, 2015, the Alabama Department of Revenue has amended Rule 810-6-5-.09 clarifying that digital transmissions, such as “on demand” movies, television programs, streaming video, streaming audio, and other similar programs that are made available to customers either by subscription or on an on-demand basis, are considered tangible personal property and subject to the rental tax. Consequently, providers of digital transmissions are engaged in the business of leasing tangible personal property and are subject to the rental tax. The rental tax is based on the gross receipts derived from charges for digital transmissions which are used in Alabama, that is, if the customer's service address is within Alabama.

ARIZONA

Online Research Services - In ALJ Decision No. 14C-20140197S-REV (3/11/2015), the Judge found that an out-of-state provider of online research services was properly assessed transaction privilege tax based on the logic that the provider was renting tangible personal property to in-state customers. While it is clear that it is now Arizona's policy to tax data services as the lease of TPP, this seems to be the first time a state has taken such an aggressive position with regard to such services.

CALIFORNIA

Computer Regulation Amended - Effective July 1, 2014, California Regulation 1502 regarding computers, programs, and data processing is amended to clarify the tax status of purchases of optional computer program maintenance contracts that include a backup copy of the computer program. The amendments clarify that (1) a backup copy of a prewritten program recorded on tangible storage media may be included in a maintenance contract sold in connection with the sale or lease of the same prewritten program; (2) taxable optional maintenance contracts are still taxed the same, even if they include a backup copy of a prewritten program recorded on tangible storage media; and (3) maintain the bright-line rule that 50% of the lump-sum charge for an optional maintenance contract that entitles the customer to receive tangible personal property is taxable, even when such a contract is paired with a nontaxable electronic download or load-and-leave transaction.

COLORADO
Software License Renewals - The Colorado Department of Revenue has released General Information Letter 13-014 (8/7/13, released 1/6/14) holding that software renewal fees are simply a further charge for the continuing right to use what has already been established to be tangible personal property, and, therefore, it is subject to tax.

Storage of Digital Medical Records Not Taxable - The Colorado Department of Revenue has issued General Information Letter General Information Letter 15-009 (4/16/2015, released July 2015) holding that certain services associated with retrieving and copying medical records, including online database storage services where no software was installed, were not taxable because there was no sale of tangible personal property.

CONNECTICUT

Web Page Design Services to be Taxable at Reduced Rate - As a result of the passage of House Bill 7061 and Senate Bill 1502, the Department has issued a Statement noting that computer and data processing services will remain taxed at 1% and web design services will become taxable at 1% on or after October 1, 2015.

FLORIDA

Information Services - For purposes of the communication services tax, H.B. 803 (5/14/2014) amends the definition of “information services” to include "data processing and other services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser whose primary purpose for the underlying transaction is the processed data or information".

IaaS and Simple Storage Services Exempt as Information Services - The Florida Department of Revenue has issued TAA No. 14A19-001 (3/13/2014) holding that a taxpayer’s sales of simple storage services and Infrastructure as a Service (IaaS), along with data transfer fees charged in conjunction with these two services, are considered information services and are not subject to either Florida sales and use tax or communications services tax (CST). The Department found that since the customer did not purchase or was granted a license to use software, the associated services are also not sales subject to tax.

Membership Fees for Streaming Video/Music Service Taxable as Communications Service; Exempt from Sales Tax - The Florida Department of Revenue has issued Technical Assistance Advisement, No. 14A19-006 (12/19/2014) holding that a membership program under which members can stream or download digitized versions of movies, television shows, sporting events, news events, and other video and music content is a "video service" and thus the membership charge is subject to the Florida
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communications services tax when charged to a Florida service address. If the subscription lapses or is cancelled, the member is no longer able to view the digital video or music content, even if the digital video or music content was downloaded. Under Florida law, the transmission or routing of audio or voice to a point, or between or among points, by any medium or method is a communications service. The definition of "video service" includes music services. Conversely, such downloaded or streamed video/music content are not sales of tangible personal property or other taxable services and are not subject to Florida sales tax.

Digital Video Content Exempt from Sales Tax - The Florida Department of Revenue has issued Technical Assistance Advisement, No. 14A19-005 (12/18/2014) holding that a taxpayer’s sale/rental of digital video content is not subject to Florida sales tax as they are not the sale of tangible personal property or taxable services. The taxpayer provides digital video content, which includes television shows, movies, sporting events, and news events, for sale or rental. Since the taxpayer does not furnish any tangible personal property for sale or rental to the customer, such sales are not subject to sales tax.

Conversely, the taxpayer’s rental of digital video content is a video service and, as such, charges made to customers for the rental of digital video content to a Florida service address are subject to communications services tax on the sales price. However, the sale of such digital video content is considered an information service, which is specifically excluded from the communications tax and thus not taxable.

GEORGIA

Department Revokes Policy Statement on High-Technology Company Computer Equipment Exemption - The Georgia Department of Revenue has revoked Policy Statement ST-2002-20-09-001 (3/28/2014), which concerns the sales and use tax exemption under O.C.G.A. §48-8-3(68) for sales or leases to qualifying high-technology companies of computer equipment exceeding $15 million in a calendar year for incorporation into a facility or facilities in Georgia. The policy statement, which also cites Reg. §560-12-2-.107 as authority, states that the requirement that a qualifying high-technology company that is affiliated with non-qualifying entities do a majority of its business with nonaffiliated entities does not apply to any exemption certificate that is issued on a company facility basis. The Department revoked the 2002 policy statement on the basis of the fact that it does not accurately reflect statutory language.

Taxability of Software Sales and Cloud Computing Services - The Georgia Department of Revenue issued Letter Ruling SUT No. 2014-02-20-01 (2/1/2014, released June 2014), discussing the sales and use tax treatment of a taxpayer’s sales of prepackaged software for download, prepackaged software enhancements for download, and cloud subscription services. The Department found that sales and use tax did not apply to the software or
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software enhancements the taxpayer sold because neither was available on tangible media and both were only delivered electronically. However, the taxpayer had to indicate the method of delivery on the invoice, purchase contract, or other sales documentation or it would be presumed that the delivery was by tangible storage media. The taxpayer’s sales of cloud subscription services to end-consumers also were not subject to sales and use tax because these services did not include the transfer of tangible personal property and because cloud services are not enumerated as taxable services under Georgia sales and use tax law.

**Internet Access Charges** - The Georgia Department of Revenue has issued Policy Bulletin SUT-2014-01 (08/29/2014) discussing the expiration of the federal moratorium on the taxation of internet access charges. Georgia law does not provide for the imposition of tax on charges for internet access. Furthermore, the Georgia General Assembly is prohibited by the Internet Tax Freedom Act (ITFA) from imposing a tax on internet access charges. Unless Congress extends the period, the moratorium will expire on November 1, 2014.

**Taxability of Cloud Computing Transactions** - The Georgia Department of Revenue has issued Letter Ruling LR SUT 2014-05 (6/9/2014, released 9/10/2014), discussing the sales and use tax treatment of a taxpayer's cloud computing services. The service was to support customers’ telecommunications equipment related to functions such as voice, video, and messaging. Customers would not receive tangible personal property as part of the service transactions. The hardware and software used to run the service were to be located on servers outside Georgia. The customers accessed the hosted applications via their own Internet, network, or telecommunications connections. The Department found that under Georgia law, sales and use tax would not apply to the taxpayer’s sale of cloud-based services or to the hosting of customer-provided software applications. The services would also not be taxable telecommunications services because the taxpayer did not hold a certificate of authority from the Georgia Public Service Commission or sell local exchange or cellular telephone service. In addition, the services would not be taxable sales of tangible personal property because the customers would not gain title, possession, or control of the software or hardware.

**ITFA Extended** - On December 16, 2014, President Obama signed into law H.R. 83 "Consolidated and Further Continuing Appropriations Act 2015" extending the Internet Tax Freedom Act (ITFA) through October 1, 2015. ITFA bars state and local governments from imposing multiple or discriminatory taxes on electronic commerce and taxes on Internet access. The moratorium was previously set to expire on December 11, 2014.

**Internet Access Charges** - The Georgia Department of Revenue has issued Letter Ruling SUT-2014-13 (09/23/2014, released 2/11/2015) holding that since internet access is not specifically listed as a taxable service, charges for a taxpayer's cable modem Internet
access service are not subject to sales and use tax. However, all purchases of tangible personal property by the taxpayer for its use in providing the Internet access service are subject to sales and use tax.

**IDAHO**

Exemption Created for Electronically Delivered & Load & Leave Software; Remotely Accessed Software & Digital Products Clarified - The Idaho Governor signed into law H. 598 (4/4/2014) which creates an exemption for software delivered electronically or via load and leave effective July 1, 2014. It further amends the definition of remotely accessed software to remove the exclusions that were put into place in 2013, but to also expressly provide that digital music, books, videos and games are subject to tax. These changes will also be effective July 1, 2014.

Digital Goods Bill Passed - The Idaho Governor has signed into law House Bill 209, effective April 1, 2015. As of the effective date, certain digital products offered with a less than “permanent right to use” are statutorily excluded from the definition of tangible personal property. The bill further clarifies that any “right to use...conditioned upon continued payment from the purchaser is not a permanent right of use.” This language works to exempt streamed content, including books, movies and music.

**ILLINOIS**

Canned v. Custom Software; Maintenance Agreements - The Illinois Department of Revenue has issued General Information Letter ST 14-0017-GIL (4/4/2014, released 5/30/2014) outlining the methods for determining whether software is taxable pre-written software or nontaxable custom software along with information on how to determine whether a computer software maintenance agreement is subject to sales tax.

Digital Books Not Taxable - The Illinois Department of Revenue has issued General Information Letter ST 14-0031 (5/12/2014, released 6/6/2014), stating that the electronic download of a book is not subject to Retailers' Occupation Tax, Use Tax, Service Occupation Tax or Service Use Tax. The Department does not consider the viewing and downloading of text and similar data over the Internet such as downloaded books, musical recordings, newspapers or magazines to be the transfer of tangible personal property. These types of transactions represent the transfer of intangibles and are thus not subject to Retailers' Occupation and Use Tax. However, the Department noted that downloads of canned software are subject to Retailers' Occupation and Use Taxes.

Computer Software Licenses - The Illinois Department of Revenue has issued Private Letter Ruling ST 14-0004-PLR (07/24/2014) holding that the sale of various types of
product subscriptions for prewritten software by the taxpayer are not taxable retail sales. The taxpayer develops and delivers mobile and web apps for its customers, and uses a widely used general scripting language for web development. Customers enter into an agreement with taxpayer to purchase the software products, and each license includes an additional version of the free, general scripting language for web development. The Department found that the following three product subscriptions provided by the taxpayer are not taxable retail sales: an enterprise ready platform for deploying, running, and managing mobile and web apps; a product to give professional PHP developers the tools to write and maintain PHP code faster, solve problems more quickly, develop in the cloud, and improve team collaboration; and the right to use the taxpayer's software solutions on an unlimited number of servers for developing, running, and managing PHP web applications for the previous two nontaxable retail sales.

Transfers of Intangible Property via Internet Exempt - The Illinois Department of Revenue has issued General Information Letter ST 14-0032-GIL (7/7/2014) holding that the viewing or downloading of text and similar data from the Internet was not subject to sales and use tax because these transactions represent transfers of intangible property. In contrast, transfers of items such as a hard drive, CD, DVD or thumb drive transferred incident to a sale of service are taxable transfers of tangible personal property.

Software License Agreements - The Illinois Department of Revenue has issued General Information Letter ST 14-0034-GIL (7/29/2014) holding that software license agreements which authorize the transfer of software without permission of the licensor are subject to sales and use tax. To be considered a nontaxable retail sale, a software license must meet numerous requirements including that the license agreement be in writing and restrictions on the duplication and transferring of the software.

Cloud Computing Services - The Illinois Department of Revenue has issued General Information Letter ST 15-0015-GIL (3/16/2015, released May 2015) discussing whether SaaS subscription fees are subject to tax. The department stated that it is evaluating the taxability of SaaS, cloud computing, computer software Application Service Providers (ASPs) and similar transactions and will make a determination regarding taxability that will operate prospectively.

Texting Service Not Taxable - The Illinois Department of Revenue has issued ST 15-0046 (7/10/2015) stating that the Department does not consider the viewing and downloading of text and similar data over the Internet such as downloaded books, musical recordings, newspapers or magazines to be the transfer of tangible personal property. The Department explained that these types of transactions represent the transfer of intangibles and are thus not subject to Retailers' Occupation and Use Tax under 86 Ill. Adm. Code 130.2105.
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INDIANA

ASPs Taxable - The Indiana Department of Revenue has issued Letter of Finding 04-20130306 (01/01/2014) holding that a car dealership's purchases of computer-based information systems, including software and web-based platforms, were subject to tax. Generally, electronically delivered canned software, including online prewritten computer software maintained on computer servers outside of Indiana and accessed via the Internet are subject to tax. With respect to GPS units purchased by the taxpayer and installed on customer's vehicles it sold as a requirement of financing the vehicle, the taxpayer asserted that the GPS units were eligible for the resale exemption because they were installed and sold with the car. However, since the taxpayer provided no information to show that the GPS units were itemized separately from the vehicles and resold to their customers, the purchase and use of the GPS units did not qualify for the exemption from sales or use tax.

Software Support Services - The Indiana Department of Revenue has issued Letter of Findings No. 04-20130229 (5/28/2014) holding that affiliated corporations were liable for sales tax on certain purchases of software support services and document scanning services. The software support services involved the purchase of taxable pre-written computer software. In addition, the corporation did not provide evidence showing the nature of the service of document scanning.

Web Design, Web Hosting and Web-based Subscription Services - The Indiana Department of Issue has issued Letter of Findings No. 04-20140207 holding that the purchase of web design and web hosting services is not subject to use tax because no TPP was included with the purchase of the services. In addition, the purchase of web-based subscription and management services did not meet the statutory description of computer software and are therefore also exempt.

Tax on Internet Access Barred - Indiana has enacted SB 80, which bars the imposition, assessment, or collection of state and local taxes on Internet access, the use of Internet access, communication services for Internet content or services, and incidental services.

Software Training Service Not Taxable - The Indiana Department of Revenue has issued Letter of Findings No. 04-20140684 (5/27/2015), ruling that a distributor’s purchase of software training services was not subject to Indiana sales or use tax. The Department concluded that the purchase of the training did not represent a purchase of tangible personal property. The distributor entered into a software licensing contract with a vendor, which included the purchase of software and training services. However, the distributor established that the cost of the training was billed separately from the cost of the software and was accounted for separately with the vendor.
**IOWA**

**Digital Photographs** - The Iowa Department of Revenue has issued Policy Letter 15300023 (5/29/2015) holding that digital photographs transferred to a customer’s USB drive at the photographer’s place of business were taxable, as the transaction was not entitled to the exemption where “the substance of the transaction is delivered to the purchaser digitally” pursuant to Iowa Code § 423.3(67). The Department stated that “[t]he photographs are being transferred to a USB owned by the taxpayer, which is not the same as a digital transfer, such as a transfer via email or a website.” Accordingly, the fact that a USB drive was involved made it a physical distribution of the photographs, and thus a taxable transaction in Iowa.

**KANSAS**

**Taxability of Digital Access Codes and Content** - The Kansas Department of Revenue has released Letter Ruling P-2015-01 (3/12/2015) holding that the retail and online sales of access codes, subscription cards, points cards, and notional value cards used to redeem digital content, download software, or access networks on a third party's server are non-taxable. Only downloadable prewritten software that is physically or digitally delivered to a Kansas user is subject to sales tax. The Department noted that when access codes are redeemed for prewritten software electronically delivered to a Kansas user in the form of complete video games or video game add-ons downloaded directly to the consumer’s device, sales tax will be applied upon redemption. However, the initial sale of access codes is not taxable, whether sold online or at retail.

**Online Video Gaming** - The Kansas Department of Revenue has revised Private Letter Ruling No. P-2015-001 (revised 3/25/2015) regarding the retailers’ sales tax treatment of online video gaming. The previously issued letter ruling held that the initial sale of printed or online access codes that permitted Kansas customers to download video games, deemed to be prewritten computer software, is not subject to sales tax. However, the revised letter ruling states that the initial sale of such access codes is subject to sales tax. Also, removed is a statement that sales tax applied only upon the redemption of the described access codes.

**Tax Amnesty Program Enacted** - The Kansas Legislature has enacted Senate Bill 270 (6/16/2015) establishing a tax amnesty program which will run from September 1 to October 15, 2015, and will apply to taxes due and owing for tax periods ending on or before December 31, 2013. Amnesty for penalties and interest will be granted only to those eligible taxpayers who, within the amnesty period have properly filed a tax return for each taxable period for which amnesty is requested, paid the entire balance of tax due and obtained approval of such amnesty by the Department of Revenue.
LOUISIANA

Video-on-Demand Not Taxable - The Louisiana 24th Judicial District Court in Newell Normand, Sheriff and Ex-Officio Tax Collector of Jefferson Parish, Louisiana v. Cox Communications Louisiana, LLC, Jefferson Parish 24th Judicial District Court, Case No. 706-766 (Pitre, J.), has ruled that a cable service provider's video-on-demand and pay-per-view video programming did not constitute tangible personal property and was therefore, not subject to sales tax. The Court concluded that the programming was a nontaxable service rather than tangible personal property.

MAINE

Definition of TPP amended - Recently enacted Maine Senate Bill 673 (4/15/2014) amends the definition of “tangible personal property” in Section 1752(17) to include "any product transferred electronically". The bill becomes effective 90 days following adjournment of the 126th Legislature's Second Regular Session.

Products Delivered Electronically are Taxable - Maine Revenue Services has issued Sales and Use Tax Bulletin 104 (6/1/2014) which clarifies that products transferred electronically are subject to sales tax. A “product transferred electronically” is a digital product transferred to the purchaser electronically that would otherwise be taxable as a sale of tangible personal property had it been transferred in a physical format. For example, a paperback book and an e-book are treated the same for sales tax purposes.

MASSACHUSETTS

Database Access - The Massachusetts Department of Revenue has issued Letter Ruling LR14-1 (2/10/2014) holding that a taxpayer's sales to Massachusetts customers of subscriptions to its database, bundled with additional support or services for one subscription price, or sold separately, are not subject to sales or use tax. The sale or license of a right to use software on a server hosted by the taxpayer is generally taxable in Massachusetts. However, where use of a software application is bundled with substantial non-taxable services such as database access or data processing, the object of the transaction may be the nontaxable service rather than a sale of software. The Department held that if a taxpayer is providing the source of the content or information, which is accessed by customers on-line, this qualifies as “database services” and is not subject to the Massachusetts sales and use tax.
Online Training Programs Exempt - The Massachusetts Department of Revenue has issued Letter Ruling 14-4 (05/29/2014) holding that the sale of an on-line training program to Massachusetts customers are not taxable when sold in a single or separately stated transaction. Taxpayer's customers were provided access to digital content with only minor user interaction. Such modules are treated as database access services since the object of the transaction is access to the information provided by the seller and therefore are exempt. If the online training programs are sold as a bundled transaction that included the transfer or use of prewritten software, then such sales may be subject to tax. Any training materials provided in tangible form, would be subject to tax.

MICHIGAN

Cloud Computing Services - The Michigan Court of Claims has held in Auto-Owners Insurance Company v. Department of Treasury (3/20/2014) that cloud computing transactions are not taxable because they are characterized as nontaxable services. Taxpayer engaged in transactions with different vendors to provide services and products which all contained software accessed through the Internet. Under Michigan law, tax is imposed on the privilege of selling or using tangible personal property in the state. Tangible personal property is defined to include prewritten, non-custom, software that is delivered by any means. The court, focusing on the term "delivered", held that the transactions were not subject to tax since no software was actually transferred to the customers.

Court Rules Online Tax and Accounting Research Tool is Not Subject to Tax as Prewritten Computer Software - The Michigan Court of Appeals has reversed the Michigan Court of Claims' decision in Thomson Reuters Inc., v. Department of Treasury, No. 313825, LC No. 11-000091-MT (Mich. Ct. App. 5/13/2014), and ruled that access to Checkpoint, an online tax and accounting research tool did not constitute the sale of taxable prewritten computer software. The Court of Claims reasoned that the case "involved an evolution of services, and because this product was taxable when it was in book or CD format, it was taxable now. The Court of Appeals disagreed. The Court of Appeals held that "any transfer of prewritten computer software as an insignificant part of the overall transaction aimed at providing a service." "There is no evidence that any de minimus amount of software transferred was the object of the transaction, or that customers sought to own or otherwise have responsibility for the prewritten computer software."

Information Services - The Michigan Court of Claims has held in Rehman Robson & Co. P.C. v. Dept. of Treas., Case No. 12-000098-MT (Mich. Ct. of Claims, 11/26/2014) that Checkpoint, an online tax and accounting research tool, was offering non-taxable information services, and not taxable cloud based services. The court held that there was no tangible personal property transferred where Checkpoint's customers only accessed
information via the web that was processed via Checkpoint’s own software, hardware, and infrastructure; therefore there was no “delivery” of software. The Court went on to note that even if prewritten software was delivered, the customer did not “use” the software sufficiently to impose the tax because the customer did not exercise a right or power over the software incident to ownership. Finally, the court noted that even if prewritten computer software was delivered and used within the meaning of the use tax, the use was merely incidental to the services rendered.

Services Provided by Remotely Accessed Software Were Exempt - The Michigan Court of Claims in *GXS Inc. v. Department of Treasury*, No. 13-000181-MT (March 4, 2015), ruled that services provided by a taxpayer via software hosted on its own servers were not subject to Michigan use tax because they did not qualify as sales of prewritten software or taxable telecommunications services. The taxpayer provided services related to electronic data interchanges, the electronic translation and transformation of business documents, and the synchronization and storage of data. No software was installed or downloaded to customers’ servers. The transactions did not meet the requirements to constitute prewritten software, as there was no "delivery" to the taxpayer’s customers. The taxpayer did not surrender possession and control of the software or transfer software to customers. The transactions also did not qualify as telecommunications services, as they fell within the exclusion for "data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser ...".

**MINNESOTA**

Digital Products Fact Sheet Revised - The Minnesota Department of Revenue has revised Sales Tax Fact Sheet No. 177 (Jan. 2014) regarding digital products. The fact sheet describes common examples of digital products and the means of transferring digital products electronically, and discusses taxable digital products; nontaxable and exempt digital products; bundled transactions; exemptions; capital equipment; sourcing; multiple points of use (MPU); and other matters.

Webinars - The Minnesota Department of Revenue has revised Minnesota Sales Tax Fact Sheet 177 (07/01/2014) discussing the taxability of digital products. Effective July 1, 2014, charges for live or prerecorded audio and audiovisual presentations (webinars) are exempt from sales tax when accessed electronically if they meet the following requirements: (1) admission to the in-person presentation is not subject to tax; (2) online participants and the presenter can interact with each other while participants view the presentation; and (3) any limits on the amount of interaction are the same for both online and in-person participants. Similarly, online tuition is not taxable when done as part of a course of study at a post-secondary school, college, university, or private career school.
Computer Software Maintenance Contracts - The Minnesota Department of Revenue has revised Minnesota Sales Tax Fact Sheet 134 (07/01/2014) discussing the taxability of computer software maintenance contracts. Specifically, optional maintenance contracts are taxable if they include any taxable items, unless the cost of these items is insignificant. These contracts may include repair and replacement parts and consumable items at no cost to the customer. Optional warranty contracts that cover future unexpected repair costs are not taxable, however, tax would apply to the parts used for such repairs.

Customization Charges Must be Separately Stated - The Minnesota Supreme Court has held in *LumiData, Inc. v. Commissioner of Revenue*, No. A14-0254, (Sept. 10, 2014) that sales of customized prewritten sales tracking software were subject to sales tax as prewritten computer software because the seller did not separately state its charges for customization. Each time the software was sold, the seller customized previous versions of its software to meet the customer’s needs. Under Minnesota law, customized portions of prewritten software are exempt if the taxpayer separately states the charges for customization. The court found that the seller failed to separate its charges for the prewritten software from the customization charges on its customer invoices, and therefore the entire sale was taxable.

Data Center Exemption - The Minnesota Department of Revenue has released information release "Qualified Data Centers" (6/26/2015) clarifying that Minnesota companies that build or refurbish data centers may qualify for a 20-year exemption on enterprise information technology equipment, software, and electricity used to operate the data centers. To receive the exemption, the taxpayer must (1) own a qualifying data center, and (2) be certified by the Department of Employment and Economic Development (DEED). More information regarding qualifications and instructions can be found on the Department's website.

**MISSOURI**

Taxation of Software Regulation Amended - Effective July 30, 2014, Missouri Regulation 12 CSR §10-109.050, discussing the taxation of software, is amended to address various recent information technology advances. In Missouri, the sale of canned software is taxable as the sale of tangible personal property. For customized software, sales are treated as nontaxable services where the true object or essence of the transaction is the provision of a technical professional service. Pursuant to the recent amendments, "software as a service" is considered a nontaxable service. It is defined as "a model for enabling ubiquitous, convenient, and on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. The term includes platform as a service [PaaS] model, infrastructure as a service [IaaS] model, and similar service models. It does not include
any service model that gives the purchaser the right to use specifically identified tangible personal property."

Electronically Delivered Software and Software Updates Exempt - The Missouri Department of Revenue has issued Letter Ruling 7503 (2/2/2015) holding that an out-of-state corporation’s sale or lease of canned software and updates sold with optional maintenance contracts provided to customers via electronic downloads are not subject to Missouri sales tax because the software and updates are not provided via tangible medium.

Management/Consulting Fees Not Taxable - The Missouri Department of Revenue has issued Private Letter Ruling No. LR 7549 (05/05/2015) holding that management and service fees charged by a management and consulting company are not subject to sales tax. Since the taxpayer does not make sales of tangible personal property and the services its provides are not among the enumerated taxable services, the management and service fees charged to its clients are not subject to sales tax.

Text Messaging Services Taxable - The Missouri Department of Revenue issued Private Letter Ruling LR 7561 (05/15/2015), ruling that a company's sale of a text messaging service using a cloud-based network is subject to sales tax as a telecommunications service. Mo. Rev. Stat. § 144.020 imposes a tax on sales of local and long distance telecommunications service to telecommunications subscribers and to others through equipment of telecommunications subscribers for the transmission of messages and conversations. Mo. Rev. Stat. § 144.010(1)(14) defines “telecommunications service” as the transmission of information by wire, radio, optical cable, coaxial cable, electronic impulses, or other similar means. The Department noted that the company, through its server and web-based software platform, transmits information, including text messages and other data, from its customer's computer network to the cellular telephones of their customer's patrons. Therefore, the company is providing a telecommunications service and should collect and remit sales tax on its sale of services to its customers in Missouri.

Electronically Downloaded Software Not Taxable - The Missouri Department of Revenue has issued Private Letter Ruling LR 7591 (7/1/2015) and ruled that the taxpayer's sales of canned software delivered through electronic download are not subject to sales tax because the customers never have possession of tangible personal property. Although canned software is generally taxable as a sale of tangible personal property, the taxability rule applies to canned software delivered through a tangible medium, not software delivered electronically.
Cloud Computing Services Not Taxable - The Nebraska Department of Revenue has updated its sales and use tax guide on computer software, Information Guide 6-511-2011 (1/22/2014), to address the taxability of cloud computing services. "Cloud computing" includes software as a service (SaaS), platform as a service (PaaS), and infrastructure as a service (IaaS). Charges for services where customers remotely access software applications, operating systems, servers, and other network components by the Internet or other online connections are not taxable. This remains true regardless of whether the hardware, software, or network components are located in Nebraska or in another state. The service provider remains responsible for sales or use tax on purchases of software, hardware, and network components used in Nebraska.

Sales Tax Guide on Maintenance Agreements - The Nebraska Department of Revenue has issued an Information Guide for Warranties, Guarantees, Service and Maintenance Agreements (10/2014), which generally provides that sales of warranties, guarantees, service agreements, and maintenance agreements are taxable when the items or property covered or services to be provided are taxable. Sales tax is due whether the agreement is sold with the item or sold separately. Sales of warranties, guarantees, service agreements, and maintenance agreements covering only real estate, fixtures or structures are sales tax exempt.

Internet Access Services Not Taxable - The Nebraska Department of Revenue has issued General Information Letter 1-14-2 (Aug. 22, 2014) affirming that the Department does not impose sales and use tax on charges for Internet access as defined by federal law.

**NEW JERSEY**

Software Regulation Changes - Effective December 1, 2014 through October 28, 2015, the New Jersey Division of Taxation has adopted N.J.A.C. § 18:24-25.6 to provide guidance regarding the sales tax treatment of software-related services. Pursuant to the Regulation, prewritten computer software is defined as tangible personal property and therefore servicing, installing, or maintaining software is subject to tax, whether the software is serviced, installed, or maintained at the purchaser's location or from or at a seller or service provider's remote location. Furthermore, the modification of prewritten computer software and customer support services are treated as non-taxable services. Clerical, data entry, accounting services, etc. - performed either with or without the use of software - are not considered to be servicing software and thus are not taxable.

During this same period, the Division of Taxation has amended Regulation § 18:24-25.1 to provide definitions for certain software products and services. “Custom software” refers to software created, written, and designed for the exclusive use of a specific purchaser and sold to that purchaser. “Customer support services” means verbal and written computer software advice or guidance. "Installation" of software refers to the act
of loading an executable file, whether tangible or electronic, containing a prewritten computer software application or program onto a device or equipment. The mere act of electronic delivery does not constitute installation.

Software Maintenance Contracts - Effective December 1, 2014 through October 28, 2015, the Division of Taxation has adopted N.J.A.C. § 18:24-25.7 providing guidance regarding the sales tax treatment of software maintenance contracts. In so doing, N.J.A.C. § 18:24-25.6 has been repealed. The new regulation finds that software maintenance contracts providing only for upgrades and updates is treated as a sale of prewritten computer software and is subject to tax regardless of whether the software is delivered on tangible storage media or electronically. However, if the upgrades and updates are delivered only electronically and for use directly and exclusively in the conduct of the purchaser's business, trade, or occupation, the software maintenance contract is not taxable. A software maintenance contract that only provides customer support services is treated as a sale of non-enumerated services and is not subject to sales tax. A software maintenance contract that includes both taxable and nontaxable or exempt products that are not separately itemized on the invoice or similar billing document is a bundled transaction and is treated as taxable unless the seller can demonstrate, using a reasonable and verifiable method based on its books and records as of the time of sale, the portion of the contract that is for nontaxable or exempt products.

NEW YORK

Digital Book Not an Information Service - The New York Department of Taxation and Finance has issued Advisory Opinion TSB-A-14(1)S (01/23/2014) ruling that its sale of an e-book is exempt and not taxable as an information service under the Department's current policy, even when shared across multiple devices or e-readers and sold with a time-limited license.

Taxable Information Services - The New York Department of Taxation and Finance has issued Advisory Opinion TSB-A-14(3)S (01/27/2014) ruling that a taxpayer’s product allowing customers single sign-on access to premium content that they have purchased from third parties who would otherwise need to access via multiple password-protected websites, is subject to New York sales and use tax as an information service. One of the product’s functions is to manage the process of authenticating the identity of those persons seeking to access the provider’s research, but it also allows research providers to give its customers a way to access investment research coming from multiple providers. Users are also able to save and organize their searches. Accordingly, the sales of the taxpayer’s product are taxable as the sale of an information service to the providers. To the extent that the taxpayer’s customers can show that their designees for the receipt of
the taxpayer’s service are accessing the service from outside New York, the service is not taxable on that portion.

ASP/Information Services - An administrative law judge (ALJ) has determined in In the Matter of the Petition of SunGard Securities Finance LLC (NYS Div. of Tax Appeals, ALJ, No. 824336, 02/06/2014) that receipts the taxpayer, a business engaged in providing consulting and related data processing services to the financial industry, derived from providing its Smart Loan product to customers were not receipts from sales of taxable prewritten computer software. The Division viewed the taxpayer's service as constituting a license of prewritten software used by its customers, but the ALJ found that the taxpayer's customers were purchasing a processing service. The ALJ noted that the parties’ service agreement did not transfer, sell, or license the system to the customers in tangible or electronic form, the customers did not have access to the taxpayer's proprietary software, and the customers could not modify the software in any manner. Thus, the ALJ found that the taxpayer's service was not prewritten computer software, but rather was a nontaxable information service because it was personal in nature. The ALJ determined, however, that the taxpayer's Lending Pit service (and related services that were available as component parts) was subject to tax as an information service, because it was primarily engaged in collecting, compiling, and analyzing aggregated database data which it made available in reports to customers and the information “was clearly not personal or individual in nature.”

The New York Tax Appeals Tribunal affirmed the ALJ’s decision (DTA No. 824336, 3/16/2015), ruling that the software company's financial information products were subject to sales tax because the information provided was not individual in nature and may be substantially incorporated in reports furnished to other persons.

Cap Amounts for Electronic News Service Exemption Announced - The New York Department of Taxation and Finance has issued Important Notice N-14-4 (4/4/2014) stating that the cap amount related to the exemption for the sale or use of electronic news services for the period June 1, 2014 to May 31, 2015, is $2,555. The cap amount from June 1, 2013 to May 31, 2014 is $2,190. Information on the exemption itself is outlined in TSB-M-12(1)S "Sales and Use Tax Exemption for Electronic News Services and Electronic Periodicals".

Internet Data Centers - The New York Division of Taxation and Finance has issued Advisory Opinion TSB-A-14(15)S (07/02/2014) holding that a business qualified as an "operator of an internet data center" and therefore qualifying for the exemption on purchases of qualifying tangible personal property for use in an internet data center. The Department found that the taxpayer operated a facility in a highly secure, regulated, and monitored environment, the facility was specifically designed and constructed for high
security, and it constantly provides uninterrupted internet access to its customers' external and internal web pages and other customer applications.

**Internet Data Centers / Web Hosting** - The New York Department of Taxation and Finance has issued Sales Tax Bulletin TB-ST-665 (08/07/2014) discussing Form ST-121.5 "Exempt Use Certificate for Operators of Internet Data Centers (Web Hosting)". Operators of internet data centers may purchase tax-free tangible personal property or services used in the operation of an internet data center in New York State. The bulletin describes the types of exempt property/services, how to use the certificate, and the penalties that may be imposed for misuse of the certificate.

**Computer Hardware** - The New York Department of Taxation and Finance has issued Sales Tax Bulletin TB-ST-243 (08/07/2014) discussing Form ST-121.3 "Exemption Certificate for Computer System Hardware". Taxpayers generally may make tax exempt purchases, rentals or leases of computer system hardware used directly and predominantly to: (1) design and develop computer software for sale; (2) provide the service, for sale, of designing and developing internet web sites; or (3) provide a combination of the uses described in (1) and (2). The bulletin describes the types of property/services that are exempt from sales tax using Form 121.3, how to use the certificate, and the penalties that may be imposed for misuse of the certificate.

**Information Services** - An administrative law judge ("ALJ") for the New York Division of Tax Appeals has issued its decision in *Matter of RetailData LLC*, DTA No. 825334 (1/22/2015), finding that a company's price checking services are subject to sales tax as taxable information services because analyzing an individual client's prices, readily available on store shelves, is not providing information that is personal or individual in nature.

**Electronic News Services Cap Amount** - The New York Department of Taxation and Finance has issued Important Notice N-15-5 (Apr. 2015) increasing the cap amount for purposes of the sales and use tax exemption for electronic news services in effect for sales or uses of such services that occur from June 1, 2015 to May 31, 2016, to $2,920. The current cap amount, in effect for the period June 1, 2014 to May 31, 2015, is $2,555.

**Cloud Computing Services** - The New York State Department of Taxation and Finance has issued Advisory Opinion TSB-A-15(2)S (4/14/2015, released 5/13/2015) holding that a taxpayer's cloud computing product, which allows customers to create virtual servers to run specific services or applications via the web, is a nontaxable service. The Department found while taxpayer's customers are provided with an operating system that constitutes prewritten software, the transfer of rights to use the operating system is incidental to the purpose of the customer's subscription, which is to run its own software applications using the taxpayer's infrastructure.
Computer Maintenance Contract Providing Canned Software Updates Taxable - The New York Department of Taxation and Finance has issued Advisory Opinion No. TSB-A-15(9)S (03/19/2015, released 05/21/2015) holding that the taxpayer's receipts from a software maintenance and support contract are subject to sales tax when the contract entitles the customer to updated versions of software. If the updated software being provided is taxable prewritten computer software, the receipts from the contract are subject to sales tax.

Video Game Software - The New York State Department of Taxation and Finance has issued Advisory Opinion TSB-A-15(25)S (06/03/2015) holding that the sale of pre-written video game software downloaded to the customer's own gaming device and charges for subscription or point cards that provide access to pre-written game software are taxable as sales of tangible personal property. The retailer should collect tax based upon where the paper receipt or access card is delivered to its customer. Charges for remote access software and content that enable faster recharges or gameplay also equate to taxable pre-written software. Sales of dollar value cards (similar to gift certificates) used in full or partial payment for unspecified goods and services at some future date are not considered to be taxable transactions at the time that the cards are purchased. However, sales tax is due on purchases of taxable property or services when the cards are redeemed.

Online Meeting Product and Remote Access Computer Product Not Taxable - The New York Department of Taxation and Finance has issued NY Advisory Opinion TSB-A-15(28)S (7/9/2015), ruling that the taxpayer's products: (1) on-line meetings; (2) online conferencing and web seminars; (3) online remote support; and (4) remote computer access, are not taxable for sales tax purposes, or for purposes of the excise tax on telecommunication products under N.Y. Tax Law § 186-e. The taxpayer's web-hosting and online meeting products allow the output stream of the host's computer to be connected with the input stream of another or multiple other computers. For each product, the taxpayer makes this connection or “bridge” on its communication server, as the users of both computers must provide their own Internet connections to the taxpayer's broker server, which then is able to bring the connection about on the taxpayer's communication server. The Department has held that “bridging” services are not telephone or telecommunication services for purposes of sales tax or the excise tax. Accordingly, the taxpayer's products are not subject to sales and use tax or N.Y. Tax Law § 186-e as telecommunication services. In addition, to access each of these products, the customer must download a Java applet, which consists of a small series of coded commands in the Java computer language that establishes a secure connection with the taxpayer's broker server. Also, for some of the products the customer can initiate a recording feature, which appears to be done through software. In light of the limited functionality of the software provided to customers in the overall context of the taxpayer's products, the products do not constitute the sale of prewritten software.
NORTH DAKOTA

Exemption for Internet Access Services Enacted - North Dakota Gov. Jack Dalrymple has signed legislation (S.B. 2096, Laws 2015), that provides a sales and use tax exemption for Internet access services. The exemption is scheduled to become effective for taxable events occurring after June 30, 2017.

Data Center Exemption Exempted - House Bill H1089 was recently signed into law creating a new sales tax exemption for enterprise information technology equipment and computer software purchased for use in a qualified data center. Such equipment or software must be incorporated into or physically located within the qualified data center. Upgraded or replacement equipment and computer software for use in a qualified data center are also exempt. The law is effective retroactively to taxable events occurring after December 31, 2014, and is effective through December 31, 2020.

OHIO

Digital Products Taxable Effective January 1, 2014 - With the passage of H.B. 59 (6/30/2013), "digital products" will be taxable in Ohio, effective January 1, 2014. "Digital products" include electronically transferred movies, music and books.

Cloud Service Taxable as Automatic Data Processing Service - The Ohio Department of Taxation has issued Opinion of the Tax Commissioner, No. 14-0001 (2/2/2014), ruling that a taxpayer's provision of certain cloud-based applications and related services that support a customer's telecommunication equipment (including voice, video, messaging, web conferencing, and mobile capabilities) is subject to Ohio sales tax because the service constitutes automatic data processing. The cloud-based service qualifies as automatic data processing because the taxpayer is providing its customers with access to computer equipment to process data. However, the service is sourced to Ohio only if the benefit of the service is received in Ohio (i.e., customer is located in Ohio and accesses the service from a location in Ohio). Furthermore, the charges for hosting services are also taxable as they are part of the price of the automatic data processing service. The software and hardware used to provide the cloud-based service are not subject Ohio use tax because they are located outside of Ohio.

OKLAHOMA
Streaming Music Services Exempt - The Oklahoma Tax Commission has issued Letter Ruling LR14-008 (05/08/2014, released 01/15/2015) holding that monthly charges for music streamed to customer locations were not subject to sales tax if separately stated from any sale or lease of tangible personal property. Similarly, the Commission found that sales tax did not apply to monthly charges for music delivered via Internet download if the charges were separately stated from charges for tangible personal property.

RHODE ISLAND

Optional Service Contracts - The Rhode Island Supreme Court affirmed the Superior Court's ruling in Long, et al. v. Dell, Inc., et al., (R.I. S. Ct., Dkt Nos. 2012-248-Appeal; 2012-249-Appeal, 06/27/2014) that Dell was not negligent for improperly collecting sales tax on optional service contracts since Dell owed no duty to the taxpayer to properly collect the tax. The Court held that a retailer's tax collection duty is to the Tax Administrator and not to the consumer. However, the Court did find that a factfinder could conclude that Dell's practice of charging sales tax on service contracts was unfair or deceptive under the DTPA because Dell's express representation that sales tax was due on the service contract portion of the taxpayer's purchase was false and such representation presumptively is material.

SOUTH CAROLINA

Certain Cloud Computing and Storage Services Exempt - The South Carolina Department of Revenue has issued Private Letter Ruling #14-2 (08/26/2014) holding that cloud and storage services were not taxable. Customers access content through an account and retain all intellectual property rights to any data or content they upload. While customers cannot download any third-party software from the taxpayer to use the taxpayers service, they must still use some operating system software and have three options: (1) use their own software; (2) use the taxpayer's open-source operating system software; or (3) use designated third party operating systems software that the taxpayer has licensed. For either open source or third party units, the operating system software runs on a virtual server, and customers have no control over the software and it does not run outside the service itself. The taxpayer does not separately sell or distribute or charge for any software or applications with this service. Additionally, the taxpayer provides storage services which allows customers to store and retrieve large amounts of data via the web. Customers are charged based on the amount of storage capacity they use within a given month and also for the volume of data uploaded or downloaded to/from the server, and are not charged for any software. The 2 services may be purchased independent of one another. The Department found that both services are exempt from sales and use tax because there is no sale of tangible personal property and do not qualify as taxable communications services.
Cloud Based Telecomm Services Taxable - The South Carolina Department of Revenue has issued Private Letter Ruling #14-4 (11/4/2014) holding that the monthly fee that a taxpayer charged its customers to provide certain cloud-based applications which supported its customers’ telecommunication equipment, including voice, video, messaging, presence, audio, web-conferencing, and mobile capabilities was taxable since these services constituted the "ways or means for the transmission of the voice or messages." The taxpayer provided such taxable services including video and audio conferencing, and services where calls were routed within the customer’s own communication system.

Cloud Service Not Taxable - The South Carolina Department of Revenue has issued Private Letter Ruling No. #14-5 (12/20/2014), ruling that a Web-based application provided for the purpose of tracking insurance claims was not subject to South Carolina sales and use tax because the service constituted a non-taxable data processing service. The taxpayer collected claims information from commercial insurance carriers, checked the information for completeness, and transformed it into a standardized electronic format. The confidential information was then loaded into a computer database accessible by the taxpayer’s customers. "Data processing" means "the manipulation of information furnished by a customer through all or a part of a series of operations involving an interaction of procedures, processes, methods, personnel, and computers." It also includes the electronic transfer of, or access to, that information.

TENNESSEE

Testing Services Exempt - The Tennessee Department of Revenue has issued Letter Ruling No. 13-21 (11/25/2013, released Jan 2014) holding that charges by a software consultant for creating a virtual lab and for the testing of its own software as a trial version onto the customer’s or its own computer hardware are not subject to tax. Prior to purchase, a customer may hire the taxpayer to test the configuration of the software to ensure proper functionality by temporarily installing and configuring the software. After the testing is completed, the taxpayer removes any software installed on the customer’s hardware. The Department found that the services performed by the taxpayer are not taxable services, nor are they provided in connection with a sale of taxable property since there was no transfer of possession of software to customers. Further, when performed for testing or demonstration purposes only, no taxable installation of computer software occurred. Furthermore, it was held that the true object of the transaction was the consulting service.

Cloud Collaboration Services Taxable - The Tennessee Department of Revenue has issued Letter Ruling No. 14-05 (dated 8/25/2014, released 10/16/2014), explaining that a technology business's cloud-based collaboration service, which provided customers with cloud based applications and related services to supplement and support a customer's
telecommunication's equipment was subject to Tennessee sales tax as the sale of intrastate telecommunications and ancillary services. Cloud services sold to a customer primarily using the service at a Tennessee address are sourced to Tennessee, and the business's purchases of hardware and software do not qualify as sales for resale.

Services Performed by ERP Software Provider - The Tennessee Department of Revenue has issued Letter Ruling 14-10 (10/13/2014, released 11/03/2014) discussing the taxability of services provided by a reseller and provider of ERP planning and software systems. The Department held that if the customers aren't obligated to purchase services along with the software, the project management services, data conversion services, documentation services, training and testing services would not be taxable. Report writing services would only be taxable if the reseller provides coding and programming that were not merely incidental, as these would be considered the provision of custom modifications or enhancements to software code. If the customers are required to purchase the services along with the software and the object of the transaction was the purchase of the software, all services would be subject to sales tax.

True Object Test - The Tennessee Department of Revenue has issued Letter Ruling No. 14-11 (10/30/2014, released 12/8/2014) holding that an IT personnel provider offering services and software to its customers must examine the totality of the circumstances for each individual customer contract in order to determine proper taxability. If the taxpayer provides a customer with all IT personnel needed for a specific software development project, it should charge sales tax on all associated personnel billings to its customer. When the taxpayer provides a combination of IT personnel, it needs to determine whether the circumstances suggest that the true object of the transaction would be subject to sales tax. If so, the entire transaction is subject to sales tax.

IaaS and Co-Location Services - The Tennessee Department of Revenue has issued Revenue Ruling No. 14-14 (12/19/2014) holding that the cloud infrastructure service, or IaaS - a service which provides customers with storage space and computing capacity on servers located in Tennessee - was not subject to sales tax. Co-location services which provide customers with a safe location to place their equipment in racks or cabinets at the taxpayer's Tennessee data center were also exempt. Sales tax, however, would be due on charges for the optional provision and installation of computer equipment.

Guidance on SaaS Issued - The Tennessee Department of Revenue has issued Important Notice No. 15-14 (June 2015) offering guidance regarding recently enacted legislation which provides that the access and use of software that remains in the possession of the seller and is remotely accessed by a customer for use in Tennessee is taxable, effective July 1, 2015. The tax applies to any access and use of the software from a location in Tennessee, and whether the charge for the software is on a per use, per user, per license, subscription, or any other basis. The software is accessed from a location in Tennessee if a customer’s residential or primary business address is in this state.
Guidance on Digital Video Gaming Products Issued - The Tennessee Department of Revenue has issued Important Notice No. 15-13 (June 2015) offering guidance regarding recently enacted legislation which provides that tax applies to any charges for the permanent or temporary right to access video game digital products, whether the charge is on a per-use, user, license, subscription, or any other basis, effective July 1, 2015. The charges are taxable when the residential or primary business address of the person who accesses the video game is in Tennessee.

Texas

Data Center Exemption - The Texas Comptroller of Public Accounts has formally adopted its temporary emergency sales and use tax exemption Rule § 3.335 implementing an exemption for tangible personal property and electricity used by data centers. Private Letter Ruling No. 201408938L (08/22/2014) provides guidance on the eligibility of the data center sales tax exemption for a taxpayer who provides cloud computing services and is proposing to build a new data center near its existing center in Texas.

Software Downloads Established Nexus - The Texas Comptroller of Public Accounts has released Decision 106,632 (09/19/2014) holding that a Utah corporation that sells electronically delivered software and digital content was "engaged in business" in Texas and must collect Texas use tax. “Engaged in business” includes a substantial physical presence requirement that is determined by the character of the rights and interest a retailer retains in the software and digital images downloaded by users located in Texas. In this case, it was determined that the recurring sale of software through electronic downloads over a long period of time constituted substantial physical presence in Texas.

Data Processing Service - The Texas Comptroller of Public Accounts has issued Letter No. 201501008L (PLR #13276853) (1/6/2015) holding that a company’s fees for "credentialing" a vendor to allow the vendor to enter secured areas of a hospital or health care facility are taxable data processing services charges. Vendors submit information to be verified, and the taxpayer compiles, stores, and maintains the information on its servers, issues an access badge to the vendor, and makes the information available to the subscribing facility. Taxable data processing services include the utilization of a computer to compile and maintain information. Additional fees to scan a vendor’s paper documents into electronic form are also taxable data processing charges.

Information and Data Processing Services - The Texas Comptroller of Public Accounts has issued Decision, Hearing No. 109,109 (2/6/2015, released April 2015) holding that taxpayer was liable for Texas sales tax on certain services for the creation or modification of plug-in advertisements contained in its software product. Specifically, a dialogue box in the taxpayer’s software program that monitored the available storage space on a
subscriber’s network was deemed to be nontaxable. However, when the subscriber subsequently paid the taxpayer to add a print feature that allowed a subscriber to print out the company’s report of available storage, this service rose to the level of taxable data processing. Additionally, the taxpayer was performing taxable data processing services when it modified its software program to create or maintain a security plug-in sponsorship that linked subscribers to their company e-mail accounts. Monthly fees received by the taxpayer for notifying a company when a review of one of the company’s products was posted on a public chat room were charges for taxable information services.

Data Center Exemption - Pursuant to House Bill 2712, effective 06/10/2015, tangible personal property that is necessary and essential to the operation of a qualifying large data center may be purchased tax free if the property is purchased for installation at, incorporation into or, in the case of electricity, for use in, a qualifying large data center project by a qualifying owner, qualifying operator or qualifying occupant. The tangible personal property must be: electricity; an electrical system; a cooling system; an emergency generator; hardware or a distributed mainframe computer or server; a data storage device; network connectivity equipment; a rack, cabinet, and raised floor system; a peripheral component or system; software; a mechanical, electrical, or plumbing system necessary to operate the property described above; any other item of equipment or system necessary to operate any of the property described above, including a fixture; and a component part of any of the property described above. The exemption begins on the date the large data center project is certified by the comptroller as a qualifying large data center project and expires on the 20th anniversary of that date, if the qualifying occupant, qualifying owner, or qualifying operator, independently or jointly makes the capital investment of at least $500 million on or after May 1, 2015 over a designated 5-year period.

Computer Program Sold to Internet Hosting Provider Eligible for Resale Exemption - The Texas Legislature has passed Senate Bill 755, effective 06/10/2015, providing that the sale of a computer program to an Internet hosting provider, as defined in Tex. Tax Code Ann. § 151.108(a), is a sale for resale if the Internet hosting provider purchases the computer program from an unrelated vendor for the purpose of selling the right to use the computer program to an unrelated user of the provider’s Internet hosting services in the normal course of business and in the form or condition in which the provider acquired the computer program. The purchase qualifies as a sale for resale only if the provider offers the unrelated user a selection of computer programs that are available to the public for purchase directly from an unrelated vendor and executes a written contract that specifies the name of the computer program sold to the unrelated user and includes a charge to the unrelated user for computing hardware. The performance of routine maintenance on the computer program by the Internet hosting provider does not affect the transaction's classification as a sale for resale.
Multistate Benefit Exemption Denied - The Texas Comptroller of Public Accounts has issued Comptroller's Decision 201506259H (6/9/2015) denying a telephone and data service provider's sales and use tax refund claim over a multistate benefit exemption for software and maintenance services that were used on computers out of state. The ALJ noted that the multistate benefit exemption applies only to taxable services, and that there was no corresponding provision for tangible personal property, as such the multistate benefit exemption did not apply to the purchase of software which is taxable as tangible personal property. The ALJ also found that the taxpayer failed to show the purchased maintenance services supported a separate, identifiable segment of its business (as opposed to the general operation of the business).

Utah

Data Storage Fees - The Utah State Tax Commission held in Taxpayer v. Auditing Div. of the Utah State Tax Comm., Appeal No. 12-2455 (6/5/2014, released 10/30/2014) in which it found a back-up storage provider’s monthly service fee for prewritten software transferred electronically to be the taxable lease of tangible personal property. Taxpayer charged a monthly service fee for data storage on the taxpayers server via the Internet. In accordance with the terms of use, customers would have to install software on their computers and had a license to use that software. The data storage was not possible without the software. While the decision was ultimately a loss to similarly situated taxpayers, both the majority and dissent appeared to agree that “the object of the transaction...was really to provide a service, that being to preserve and protect the customer’s data and that the software was merely incidental to that service.” Had the taxpayer argued this in their brief (or oral argument), it appears that the Tax Commission would have sided with the taxpayer.

Vermont

Tax on Cloud Computing Services Repealed - The Vermont Governor has signed into law Senate Bill 138 (6/2/2015), effective July 1, 2015, which repeals the recently enacted tax on charges for the right to remotely access prewritten software, otherwise known as SaaS or cloud computing. As passed, the exemption language specifically provides that “[c]harges for the right to access remotely prewritten software shall not be considered charges for tangible personal property under 32 V.S.A. § 9701(7).”

Virginia

Electronic Document Services - The Virginia tax commissioner has issued Ruling 14-14 (1/30/2014) holding that a printer's charges for electronic document services are not
subject to sales tax because the charges are optional, separately stated, and not integral to
the production of printed materials. As such, the electronic document services qualify for
the exemption promulgated in Va. Code § 58.1-609.5 1. In addition, the company's
optional programming services were deemed not taxable because the programming is
customized and unique to each customer. The Taxpayer offers optional programming
services to those customers that require software programming changes to make their
data compatible for transmission to the Taxpayer and compatible with the Taxpayer's
processing software.

Internet Service Provider Exemption - The Virginia Tax Commissioner has issued Ruling
of Commissioner, P.D. 14-92 (6/16/2014), ruling that the Internet Service Provider
exemption may apply to the extent that the taxpayer's assets at issue were used for
Internet services in Fairfax County, regardless of whether they were used in retail or
wholesale Internet service activities. However, if any of the assets at issue were used
outside of Fairfax County, they would not receive the same treatment. Rather, assets used
outside of Fairfax County to provide web hosting or any other wholesale Internet service
would not qualify for the exemption. However, it if could be shown that any of those
assets were used in a "retail" capacity, then the exemption applies. Property used in both
wholesale and retail Internet service activities outside of Fairfax County would constitute
dual use property. The tax on such dual use property must be prorated between the
percentage of time the property was used in taxable activities (wholesale Internet
services) and the percentage of time used in exempt activities (retail Internet services).

Electronically Delivered Software - The Virginia Department of Revenue has issued
Public Document Ruling 14-178 (10/23/2014) holding that charges for prewritten
software and related services billed on one invoice with taxable computer hardware and
other equipment were taxable even if the software was delivered electronically. While the
sale of software delivered electronically is generally not subject to sales and use tax, the
exemption for software services only applies when there is no exchange of tangible
personal property. In this case, the software was part of the overall sale of taxable
tangible personal property and was properly included in the taxable sales price of the
system.

Internet Access Fees - The Virginia Department of Revenue has issued Public Document
Ruling 14-179 (10/24/2014) holding that a company's purchase of Internet access from an
ISP does not constitute an exchange of tangible personal property, therefore the
transaction is exempt for both retail sales and use tax and communication sales and use
tax purposes. However, when the company leases equipment to Virginia customers that
contains an Internet connection, and the cost of the internet access service is bundled into
the monthly lease price of the equipment, the charge is subject to sales tax.

Internet Reactivation Fees Taxable - The Virginia Department of Taxation has issued
Ruling of Commissioner P.D. 15-44 (3/18/2015) holding that a high-speed Internet
service provider’s charges to subscribers for Internet reactivation fees are subject to the Virginia communications sales tax. While the Internet Tax Freedom Act bars the application of state tax on Internet access service, it does not prohibit Virginia from deeming the connectivity charges subject to the communications sales tax. In accordance with the Act, Virginia is authorized to apply the communications sales tax to communications services, so long as such application does not violate the provisions of the Act.

Software Taxable - The Virginia Department of Taxation has issued Virginia Public Document Ruling 15-118 (06/16/2015) ruling that a taxpayer's purchase of software was a taxable exchange of tangible personal property even though there was written evidence the software was also delivered electronically. The taxpayer argued that prewritten software was delivered electronically, and should qualify for an exemption from sales and use tax since there was no exchange of tangible personal property. The Department noted that a “ship to” address was included on the invoice which indicates a delivery of tangible personal property occurred. The Department further noted that there was language in the customer agreement suggesting the software was delivered in a tangible medium. Additionally, a software DVD was mailed to the taxpayer as part of the software package, which is an exchange of tangible personal property, regardless of a prior electronic delivery. The Department clarified that use tax was assessed on services provided in connection with the sale of the software, not the software itself since that was already taxed by the vendor. Since the Department uses the “true object” test, the true object of this transaction was the sale of the software, which included the software, training, and consulting services; therefore, the services are fully taxable.

WASHINGTON

Data Center Exemption Explained - The Washington Department of Revenue has issued a special notice (1/9/2014) explaining the application of the data center exemption to purchases of eligible replacement servers. In order for eligible data centers that began construction between March 31, 2010, and July 1, 2011 to qualify for exemption on replacement servers, the servers must be installed before April 1, 2018. For those data centers that began construction after March 31, 2012, and before July 1, 2015, purchases of replacement servers are exempt if they are put into regular use before April 1, 2020. The exemption also applies to purchases of server equipment, power infrastructure, and installation services.

Alarm Monitoring Services - The Washington Department of Revenue has issued Excise Tax Advisory No. 3189.2014 (3/7/2014) holding that an electronically transferred alarm monitoring service that uses one or more software applications is subject to Washington sales tax and B&O tax as a digital automated service unless the exclusion for primarily human effort applies. If an alarm monitoring service does not have an automated
component and is not transferred electronically, it is subject to the service and other activities B&O tax. If the average of the time factor and the cost factor exceeds 50% human effort, the service is deemed to be conducted using primarily human effort.

**Rule on Digital Products Amended** - The Washington Department of Revenue has amended WAC 458-20-15503 (effective July 18, 2014), which is its rule on digital products to reflect a recently enacted sales tax exemption for standard financial information purchased by qualifying international investment management companies. The exemption applies regardless of whether the information is provided in a tangible format, on a tangible storage medium, or as a digital product transferred electronically. Sellers must obtain a buyer’s retail sales tax exemption certificate or capture the relevant data elements as allowed under the Streamlined Sales and Use Tax (SST) agreement. A buyer may not continue to claim the exemption when it has purchased during the current calendar year standard financial information with an aggregate total selling price in excess of $15 million. Buyers must report the amount of tax preference received. However, if the benefit is less than $1,000 per year or the buyer files annually, the reporting requirement does not apply. The exemption expires July 1, 2021.

**Out-of-State Web Hosting Company had Economic Nexus** - The Washington Department of Revenue has issued Determination No. 14-0342 (4/30/2015) holding that an out-of-state web hosting company with over $250,000 in receipts from Washington in 2010 through 2012 had substantial nexus with the state and, therefore, was subject to an assessment of service and other activities business and occupation (B&O) tax. Since the company met the statutory nexus threshold test, the Department of Revenue’s application of the economic nexus statute to assess tax on the company’s apportionable activities did not violate the Commerce Clause of the U.S. Constitution.

**Sourcing and Nexus Rule Revised** - The Washington Department of Revenue has revised Rule 193 (WAC 458-20-193) effective August 7, 2015, on the application of retail sales tax and business and occupation (B&O) tax to interstate sales. The rule no longer allows an out-of-state vendor to disassociate its in-state business activities from its in-state sales in order to avoid tax liability. Additionally, a vendor that stops the business activity that created nexus with Washington continues to have nexus for the remainder of the calendar year plus one additional year for purposes of B&O tax, retail sales tax, and all other taxes reported on the excise tax return.

**Wisconsin**

**Digital Newspapers** - The Wisconsin Department of Revenue has issued Publication 233 (March 2014) providing sales and use tax guidance for newspaper publishers. The publication reflects the Department’s positions regarding new laws effective as of March 1, 2014. The publication discusses, among other things, the definition of "newspaper";
taxable and exempt sales; tangible personal property and services purchased by
newspaper publishers; recordkeeping; and other matters. Specifically, electronically
delivered newspapers that are an exact replica of the printed version are exempt.
However, a newspaper transferred electronically to the purchaser that provides other
items along with the newspaper such as digital audio works and digital audiovisual
works, may be subject to tax.

Internet Access Services - The Wisconsin Department of Revenue has issued Sales and
Use Tax Report 3-14 (09/01/2014) holding that sales of Internet access services are
subject to Wisconsin sales or use tax when the customer's place of primary use is in
Wisconsin. Wisconsin will continue to tax Internet access services regardless of whether
the federal moratorium expires. However, if federal legislation is passed that would affect
how Wisconsin taxes Internet access services, a notice will be sent to taxpayers.

WYOMING

Sourcing of Services - The Wyoming Department of Revenue has issued Policy
Statement (July 31, 2014) holding that effective July 1, 2014, Wyoming will begin
sourcing sales of taxable services based on where the customer first makes use of the
service after it is rendered.

Computer Software and Services Guidance - The Wyoming Department of Revenue has
issued a Wyoming Sales and Use Tax Bulletin No. 07/01/2014 (Computer Sales and
Services), explaining the taxability of sales of computer hardware, software and services.
The publication discusses custom versus prewritten software, installation and repair
services, Cloud, SaaS, PaaS, and IaaS, web hosted sites, training, data storage, and
consulting.