June 29, 2011

IPT

2011 Annual Conference

Software, Digital & the Cloud: Multi-state Sales & Use Tax Update

---

Carolynn S. Iafrate
Industry Sales Tax Solutions
Phone: (610) 458-7227
csiafrate@industrysalestax.com

ALABAMA

Information Services - The Alabama Department of Revenue has issued Revenue Ruling 2001-001 (10/1/2010) holding that a commercial information provider's services through a risk management solutions internet database are not subject to sales and use tax because such services do not fall within the Department's definition of canned software, nor does Alabama impose tax on electronic business and financial information accessed through an Internet database.

ARKANSAS

Digital Audio Works - The Arkansas Legislature has passed H.B. 1547 which amends Arkansas Code Ann. § 26-52-301 to provide that Arkansas sales and use tax applies to sales of, or subscriptions to, audio-visual work and digital audio work to an end user who does not have the right to permanent use, and whose use is contingent on continued payments to the seller. “Digital audio-visual work” is defined as an electronically transferred series of related images that when shown in succession, impart an impression of motion, together with accompanying sounds, if any. “Digital audio work” means an electronically transferred work that results from the fixation of a series of musical, spoken, or other sounds, including ringtones.

ARIZONA

Out of State Computer Software Hosting Not Taxable - The Arizona Department of Revenue has issued Private Letter Ruling LR09-001 (2/3/2009) stating that the transfer of licensed, prewritten computer software hosted in another state to a hosting server in Arizona which is owned by an unrelated third party, does not result in an Arizona use tax liability. The taxpayer's software licenses constituted leases of tangible personal property, transactions for which there is no corresponding use tax liability.

Publishing Software - Arizona has issued DOR Director's Decision 200800211-S (1/22/2010) which held that receipts from software support, updates and new releases for a combined fee were taxable under the retail classification and were not exempt under the machinery and equipment exemption. Editing software used by a newspaper publisher did not qualify as machinery and equipment used directly in manufacturing, processing, fabricating or job printing.

CALIFORNIA

"Computer Program" Definition Clarified – Effective June 11, 2009, California Regulation 1502 regarding computers, programs, and data processing is amended to

clarify that the statutory definition of "computer program" includes subdivisions such as routines and similar programming building blocks, as described in Revenue and Taxation Code Section 6010.9(c). The definition is further clarified to specify that the term "program" in the regulation is consistent with the definitional and related explanatory provisions pertaining to "computer programs," "custom computer programs," and "existing prewritten programs" in Revenue and Taxation Code Section 6010.9(c) and (d).

Warranties & Maintenance Agreements - The California State Board of Equalization has issued SBE Information Publication 119, “Warranties and Maintenance Agreements”. In general, separate charges for mandatory warranties are taxable provided the sale of the associated taxable item is taxable; separate charges for optional warranties are not taxable (except for optional software maintenance agreements). Tax does not apply to warranty repairs that includes only labor and does not require parts. The tax will apply, however, to charges for repair parts based on who backs the warranty. Unless the warranty states otherwise, the person providing the warranty contract is liable for the tax.

COLORADO

Computer Regulation Repealed - The Governor of Colorado has signed into law HB 1192 which, effective March 1, 2010, repeals Special Regulation 7: Computer Software. Under the new legislation, canned or standardized software is taxable regardless of the method of delivery. Also, the definition of tangible personal property is amended.

Downloaded Property Taxable - The Colorado Department of Revenue has issued General Information Letter GIL-09-25 (5/13/2009) which holds that downloaded or electronic data is corporeal (tangible) property and therefore subject to tax. Documents downloaded from a vendor's website to a taxpayer's computer are taxable.

Multiple Points of Use - Effective March 2, 2010, the Colorado Department of Revenue has adopted an Emergency Regulation Colo. Code Regs. § 39-26-102.13, regarding the apportionment of Colorado sales and use tax On computer software, following the enactment of the elimination of the sales tax exemption on electronically delivered software. Colorado sales and use tax is imposed on standardized software that is concurrently available for use in multiple jurisdictions without regard to the jurisdiction in which the purchaser takes delivery or the location or ownership of any server on which the software is installed. Guidance for the apportionment of the tax on multiple points of use (MPU) of standardized software and information regarding associated maintenance agreements is provided in the Emergency Regulation.

Computer Software Emergency Regulation Amended - Effective September 14, 2010, the Colorado Department of Revenue has amended emergency regulation section 39-26-

102.13 which relates to the apportionment of use tax for multiple points of use. A purchaser may use any reasonable, but consistent, method of apportionment that is supported by the purchaser's business records as they exist at the time of the consummation of the sale. However, apportionment methodologies based on the number of employees or users must be based on the permanent location of those employees or users. The regulation is scheduled to expire December 13, 2010.

Computer Software Apportionment Regulation Amended - The Colorado Department of Revenue has amended Emergency regulation 39-26-102.13 to clarify that an apportionment formula based solely on the number of employees or users who are not permanently in Colorado is prohibited. However, use of an apportionment formula based upon the number of concurrent user licenses used in Colorado, even though one or more licenses are used by a temporary employee or user, is allowed. The Regulation was made effective September 14, 2010, and is scheduled to expire December 13, 2010.

Maintenance Agreements - The Colorado Department of Revenue has reissued FYI Tax Publication Sales 70 (November 2010) discussing the taxability of warranties and maintenance agreements. Generally, mandatory warranties and maintenance agreements are taxable. An exception is provided for companies that receive written Departmental permission to charge sales tax on a percentage of the contract for goods sold and exempt the service portion of the contract. Optional contracts are generally exempt. Sellers responsible for warranty work must then pay sales or use tax on the cost of the materials used in performing the maintenance. However, sellers may elect to charge sales tax on optional contracts to avoid having taxable and nontaxable warranty parts or maintenance components.

Permanent Regulation Issued for Standardized Software - The Colorado Department of Revenue has issued Regulation 39-26-102.13, effective March 2, 2011, regarding the sales and use taxation of software. The regulation provides guidance on the de minimis rule in connection with standardized software and software maintenance agreements.

Budget Approves Software Exemption - The Colorado Legislature has agreed to a budget deal which includes the repeal of the imposition of sales tax on downloaded software, which was enacted in 2010. The software tax repeal will begin July 2012

FLORIDA

Custom Software – Technical Assistance Advisement Memos 08A-035 (12/16/08) and 09A-001 (1/8/2009) held that a taxpayer’s purchase of software qualified as the sale of custom software and was therefore not subject to sales and use tax. In both memos, the software sold by the vendor would not run, without the services performed by the vendor. As such, it was not fully useable by the customer without modifications.

Electronic Information Services Not Taxable - Florida Technical Assistance Advisement memo No. 09A-049 (9/23/2009) holds that a taxpayers sale of electronic information services are not subject to tax. The taxpayer delivers the information service via a telephonic connection or connections over the Internet. Such services are not subject to sales and use tax because sales of electronically delivered information are exempt. However, the taxpayer has to collect sales tax on charges for terminal equipment that are separately stated from the monthly service fees, which are in effect a lease payment.

Taxability of Software - The Florida Department of Revenue has issued Technical Assistance Advisement 10A-010 (2/16/2010) explaining the taxability of legal billing services software sold by the taxpayer, which is generally sold as canned software. Since the taxpayer does not complete a detailed analysis in selecting or preparing the programs for each customer, the sale of the software is subject to sales tax. However, when the taxpayer modifies the software as part of the sale, and does not sell other tangible personal property, then the transaction is not subject to sales and use tax. In addition, annual license renewals are renewals of the initial transaction. Therefore, if the initial transaction was subject to sales tax, then the subsequent renewal of that transaction is subject to sales tax.

Taxation of Streaming Online Video Discussed - The Florida Department of Revenue has issued Technical Assistance Advisement No. 10A-031 (6/28/2010) holding that the sale of on demand Internet streaming video to prepaid customers through a Web site was a communication service that was subject to communications services tax and gross receipts tax in Florida, but not sales and use tax.

License to Use Software Delivered Electronically Exempt - The Florida Department of Revenue has issued Technical Assistance Advisement No. 10A-028 (6/21/2010) holding that the license to use software delivered electronically is not subject to Florida sales tax. In addition, a service agreement that covers the cost of maintenance, repair, or replacement of software that was electronically downloaded is also exempt.

Service Plans Sold in Conjunction with Hardware/Software - Florida Technical Assistance Advisement 10A-035 (7/22/2010) holds that the provision of service plans for computer hardware/software sold in conjunction with the sale of a computer server are the sales of tangible personal property and therefore taxable as part of the "sales price". In addition to the warranty that comes with the purchase of a computer server, the taxpayer sells a service plan that provides for a quicker response time should a service be required. Since the service plans are sold with computer servers, which are items of tangible personal property subject to sales tax, the service plans are considered "services" subject to sales tax when sold as "part of the sale," of tangible personal property and, thus, subject to sales tax.

Electronic Information Services - The Florida Department of Revenue has issued Technical Assistance Advisement 10A-052 (12/3/2010) which holds that the sale of a taxpayer's "risk management solutions database," that provides information about the financial condition of businesses, and related upgrades and tools, is not subject to sales tax as long as the products are accessed through the Internet, in an electronic format, and are not sold in conjunction with the sale of tangible personal property.

Digital Goods - The Florida Department of Revenue has issued Technical Assistance Advisement 10A-051 (12/6/2010) which holds that the sale of digital certificates accessed electronically are not subject to sales tax so long as no tangible personal property is transferred as part of the transaction. A charge solely for electronically transmitted information is not subject to sales tax as there has been no exchange of tangible personal property.

Information Services - The Florida Department of Revenue has issued Technical Assistance Advisement 10A-050 (12/2/2010) which holds that the sale of sales leads delivered electronically are neither the sale of tangible personal property, nor the sale of a taxable information service. Therefore, the sale is not subject to tax.

Digital Transfer of Video Production and Video Press Releases - The Florida Department of Revenue has issued Technical Assistance Advisement, No. 11A-002 (1/13/2011) which provides that video production and editing is not subject to sales tax if the product is transferred digitally via file transfer protocol or e-mail; however, files transferred via a hard drive, CD, flash drive, DVD, etc. are subject to sales and use tax.

GEORGIA

SST Conformity Legislation Enacted - The Governor of Georgia has signed into legislation H.B. 1221 allowing Georgia to become a member state under the Streamlined Sales and Use Tax (SST) Agreement. Georgia is currently a non-conforming advisory state with respect to the Agreement. The legislation becomes effective on January 1, 2011.

High-Technology Exemption - The Georgia Court of Appeals has held in *ChoicePoint Services, Inc. v. Graham* (Ga. Ct. App., Dkt. No. A10A0234, 07/15/2010), that a company's tax-exempt purchases of electronically delivered computer software qualified toward the $15 million threshold under the high-technology exemption statute which allows exemptions or sales tax refunds for companies with more than $15 million in computer equipment purchases per year. The statute plainly defines computer equipment as any computer hardware or software. Also, the statute enumerated several items which do not qualify as computer equipment for the exemption, but did not exclude tax-exempt

computer purchases. The Department of Revenue's regulations stating that the exemption applies to purchases and leases of computer equipment "not otherwise exempt," were not binding because they contradict the plain language of the statute and legislative intent.

Emergency SST Regulation Adopted - The Georgia Department of Revenue has adopted Emergency Regulation 560-12-1-0.20-.37, effective October 27, 2010, which provides guidance concerning changes with respect to certain requirements of the Streamlined Sales and Use Tax Agreement. The Rule discusses the Tax Rate Database controlled by the State, the Certified Automated System, exemption certificate requirements and nexus. The emergency regulation will remain in effect for 120 days or until the Department accepts a subsequent rule.

Maintenance Contracts - The Georgia Department of Revenue has revised its Streamlined Sales and Use Tax (SST) Agreement taxability matrix, which becomes effective January 1, 2011 when Georgia becomes an associate member of the SSTP. Under the revised matrix, mandatory computer software maintenance contracts for prewritten software are taxable at a rate of 100% if the contract includes only tangible updates/upgrades, and are taxable at a rate of 50% if the contract also provides for services. The entry for optional software maintenance contracts for prewritten software that only provide for updates/upgrades no longer states that such contracts are taxable at 50% of the value of the updates/upgrades.

Informational Bulletin on SST Membership Issued - The Georgia Department of Revenue has issued Informational Bulletin SUT 2010-10-13 (Revised 12/3/10) detailing the conformity of its policies to the Streamlined Sales and Use Tax (SST) Agreement. Georgia became an associate member on January 1, 2011. As of that date, the Department's administrative policies conform to the Agreement's requirements.

ILLINOIS

Application Service Provider - According to General Information Letter ST-09-0103 GIL (8/3/2009), canned computer software is considered taxable tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means or other media. Therefore, the Department holds that ASP's are taxable as the sale of canned software, and not exempt as either custom software or as an information service. The Department reiterates its policy "that the proper forum to determine the appropriate taxation of computer software Application Service Providers (ASPs), software hosting and web-based software is through a formal administrative rulemaking process rather than on a case-by-case basis through individual inquiries."

Transfer of Electronic Information Exempt - The Illinois Department of Revenue has issued General Information Letter ST 10-0069-GIL (8/10/2010) holding that sales of

services involving the electronic transfer or download of information or data are not subject to Illinois retailers' occupation (sales), service occupation tax or use tax because the electronic transfer or downloading of data is not considered the transfer of tangible personal property.

Computer Software and Services Discussed - The Illinois Department of Revenue has issued General Information Letter ST 10-0077 GIL (8/23/2010) discussing the sales tax treatment of an out-of-state company's sale of computer software services provided to local customers. The Department discusses, generally, how canned computer software is considered taxable tangible personal property regardless of the form in which it is transferred or transmitted. If the computer software consists of custom computer programs, then the sales of such software may not be taxable. Assuming that any services provided, such as installation, phone support, training, and seminars, do not require the transfer of tangible personal property, charges for such services are exempt if they are separately stated from the selling price of canned software. If computer software training or other support services are provided in conjunction with a sale of custom computer software or a license of computer software, the charges for that training are not subject to tax. However, the Department declined to issue guidance on web-hosting services, web-based software and ASP's within the information letter forum.

Transfer of Canned Software - The Illinois Department of Revenue has issued General Information Letter ST 10-0082-GIL (9/8/2010) holding that an out-of-state computer equipment leasing company may be liable for sales tax on sales of canned software because the transfer of non-custom computer software is taxable regardless of the delivery method.

ASP's and Web Hosting Services - The Illinois Department of Revenue has issued General Information Letters ST-10-0089 GIL, ST-10-0103 GIL and ST-10-0077 GIL reiterating its position that the Department will not rule on the taxability of ASP's without formal guidance from the Legislature. Specifically, the Department states that it "believes that the proper forum for providing guidance regarding transactions involving computer software ASP's is through a formal administrative rulemaking process, rather than through individual inquiries…until that time, ASPs will have to determine, based on the definition contained in Section 2-25 of the Retailers' Occupation Tax Act, whether the products they sell or lease are 'computer software'."

Online Database Exempt - The Illinois Department of Revenue has issued General Information Letter ST 10-0121-GIL (12/22/2010), which holds that a company in the business of providing business financial information online is not liable for Illinois sales and use tax on fees charged to its customers for accessing an online database when the company does not transfer any software or other tangible personal property to those customers. Information or data that is electronically transferred or downloaded is not considered the transfer of TPP.

INDIANA

Taxability of Software Maintenance Agreements - The Indiana Department of Revenue has issued Letter of Findings No. 08-0413 (1/29/2009) which held that a taxpayer's purchase of certain software maintenance agreements were exempt from sales tax because they did not mandate the transfer of upgrades or updates. However, the taxpayer did not provide evidence that the remainder of the agreements lacked a guarantee of upgrades and, therefore, these were found to be taxable. Furthermore, the taxpayer's purchases of certain online database subscriptions remained taxable because they constituted the transfer of property packaged for sale to the general public.

Web-Based Computer Software Taxable - Indiana Letter Ruling #2009-03 ST (3/30/2009) holds that the sale of software via a web-based program is subject to sales tax. The web-based program is designed to cause a computer to perform a task, namely record, save, process, and then access data provided by the program's users; and is not designed and developed to the specifications of a specific purchaser. Therefore, the web-based program is considered prewritten computer software and constitutes tangible personal property. The fact that the program is accessed via the Internet as opposed to on the customer's own computer is irrelevant to the taxability of the program, and the company's charges for access to the program are subject to sales tax.

Information Services - The Indiana Department of Revenue has issued Letter of Findings No. 09-0133 (8/27/2009) which holds that consumer credit and criminal background reports purchased by a taxpayer were subject to Indiana sales tax as information services where the reports consisted of information compiled by a computer and sold in the same form as it was, regardless of the way the reports were transmitted to the customer. A fee was paid for each background search report generated.

Application Service Providers - The Indiana Department of Revenue has issued Letter of Findings No. 09-0418 (1/27/2010) which held that a taxpayer was liable for Indiana sales tax on software it accessed through the Internet because Web-based programs qualify as taxable prewritten software. As long as the Web-based software is not designed and developed to the specifications of a specific purchaser, the program (i.e. an ASP) is deemed prewritten computer software.

Software Maintenance Agreements - The Indiana Department of Revenue has issued Letter of Findings No. 09-0617 (12/11/2009) which holds that the taxpayer's purchase of software maintenance contracts were taxable because they qualified as retail unitary transactions. The maintenance contracts included both software support services and computer updates. If reasonable and separately stated, the exempt services could be distinguished from the taxable computer updates.

Online Database Access Subscription - The Indiana Department of Revenue has issued Letter of Findings No. 09-0656 (3/17/2010) which holds that a taxpayer is liable for sales and use tax on its online database access subscriptions and credit reports. However, the dealer was not liable for tax on two electronic subscriptions in which it provided the contract details.

Out of State Software Seller Lacked Nexus - The Indiana Department of Revenue has issued Letter of Findings No. 09-0939 (4/26/2010) holding that an out-of-state company was not liable for Indiana sales tax on sales of software to Indiana customers because that taxpayer lacked the appropriate nexus. Its Indiana-based employees were sales staff and technical advisors who serve regional, non-Indiana clients and do not engage in selling to Indiana customers. In addition, these employees worked out of their homes. Though the company was not liable for the collection of sales tax, the company's Indiana customers might owe use tax on their licenses of the taxpayer's products.

Computer Maintenance Contracts - The Indiana Department of Revenue has issued Letter of Findings 09-0994 (5/18/2010) which has ruled that a computer retailer's maintenance agreements were subject to sales tax because the agreements contained provisions for periodic service in which tangible personal property would be provided to the customer. In addition, Supplemental Letter of Findings No. 10-008 (3/24/2010) was issued holding that optional warranties and maintenance agreements that contain the right to have property supplied when the property is needed are taxable if there is a reasonable expectation that tangible personal property will be supplied with the agreement.

Maintenance Agreements - The Indiana Department of Revenue has issued Letter of Findings No. 10-0094 (7/29/2010) holding that taxpayer was liable for Indiana sales tax on the sale of maintenance agreements because the maintenance agreements were part of a unitary retail transaction. Sales of tangible personal property and services are taxable unitary retail transactions unless: (1) the merchant is primarily a service provider, (2) the tangible personal property is consumed incident to the service, (3) the price for the tangible personal property doesn't exceed 10% of the price, and (4) the merchant pays tax when it acquires the tangible personal property.

Online Database Services - The Indiana Department of Revenue has issued Letter of Findings 09-0979 (8/31/2010) which holds that monthly access fees for online database services are not taxable in Indiana.

IOWA

Exemption for Web Search Portal Businesses - The Iowa Department of Revenue adopted Regulation 701-230.11, effective 1/7/2009, which exempts from sales and use tax purchases of specified property and services by a qualifying web search portal

business. A web search portal business means an entity whose business among other businesses is to provide a search portal to organize information; to access, search, and navigate the Internet, including research and development to support capabilities to organize information; or to provide Internet access, navigation, or search functionalities. In addition to meeting this definition, the business must meet a number of additional qualifications, which are found in the regulation.

Electronically Delivered Software Exempt - The Iowa Department of Revenue has released a policy letter, Document Reference 10300015 (3/29/2010), holding that a company is not liable for sales tax on software downloaded electronically because retail transactions delivered to purchasers digitally or electronically are exempt from sales tax.

KANSAS

Computer Software Maintenance Agreements - The Kansas Department of Revenue has issued Revenue Ruling 19-2009-01 (6/2/2009) discussing the state sales taxability of computer software maintenance agreements. Both mandatory and optional maintenance agreements for custom software are exempt from tax. Mandatory canned or prewritten computer software maintenance agreements are taxable and include any separately stated charges for technical support services. Optional computer software maintenance agreements sold with or sold separately from or after the canned or prewritten software sale, are characterized as 50% for taxable software in a bundled transaction in which the taxable and nontaxable products are not separately itemized on the invoice or billing document, but separately stated charges for technical support services are exempt. Whether separately stated or not, charges for upgrades and enhancements for canned or prewritten software and sales of copies of operating manual updates are taxable.

Software Access Charges - The Kansas Department of Revenue has issued Private Letter Ruling No. P-2009-005 (6/26/2009) which addresses the sales and use tax treatment of monthly fees to access and use canned, prewritten computer software. A Kansas customer paid the monthly fees to a California company to access the software program located on a server in California. Kansas sales and use tax did not apply to the charges because Kansas does not impose tax on the electronic access of information on the provider's server located outside the state.

Membership Fees to Access Website Not Taxable - The Kansas Department of Revenue has issued Opinion Letter O-2010-003 (4/29/2010) which holds that a taxpayer who runs an Internet website where writers can post articles on the site for sale to buyers and charges membership fees to access its website is not subject to Kansas retailers' sales tax. Kansas sales tax does not apply to information services or to sales of digitized products transferred electronically, except for sales of canned software. Even if the articles were transferred as paper copies or on CDs, the real object of the buyer is to acquire the right

to republish the article, a nontaxable intangible right, rather than to obtain the article in a tangible form.

Guidance on Computer Products, Services and Web-Based Transactions Issued - The Kansas Department of Revenue has issued Information Guide No. EDU-71R (7/23/2010) discussing the retailers' sales tax treatment of charges for computer products and services and web-based sales and services. Among some of the topics discussed, are: custom v. canned software, sourcing of software, internet-related sales transactions, digital products, web hosting and design and information services.

ASP's - The Kansas Department of Revenue has issued Opinion Letter No. O-2010-005, (6/22/2010) which states that application service provider (ASP) services are not subject to Kansas retailers' sales tax. In addition, numerous separately stated charges imposed by ASP providers are not subject to tax, such as recurring monthly charges, setup fees, support fees, training fees, data migration fees, and forms programming fees. Charges for service manuals and provider software are not subject to tax if provided as part of the ASP service package. Sales tax may apply, however, if an ASP sells canned software that can be used independently of the ASP service. Common features identified among ASP's include (1) full ownership or operation of the software application; (2) ownership, operation, and maintenance of the servers supporting the software; (3) the furnishing of information through the Internet or a "thin client"; and (4) billing on a monthly, annual, or per-use basis.

Computer Software Maintenance Agreements - The Kansas Department of Revenue has revised Revenue Ruling No. 19-2009-01 (6/2/2009) which discusses the retailers' sales tax treatment of sales of computer software maintenance agreements. The revised ruling adds that the definition of "computer software maintenance contract" includes a contract sold by a person other than the vendor of the computer software to which the contract is related. The revised revenue ruling supersedes the previous ruling and is effective beginning July 1, 2010.

Data Conversion Software and Services - The Kansas Department of Revenue has issued Private Letter Ruling No. P-2010-005 (6/22/2010) which discusses the application of Kansas retailers` sales tax to data conversion services and software. Because sales and use tax applies to the sale or use of canned software by means of lease, license, or rental regardless of how the software is transferred, the sale or use of canned data conversion software is subject to tax. Any charges imposed for the modification or enhancement of canned data conversion software are exempt if performed for a specific customer and separately stated on the invoice to the customer. Furthermore, if a business is responsible for loading data conversion software onto a customer's computer, monitoring the software operation, and ensuring a successful conversion, the charges for such services (even if the service is remotely performed) and software are not subject to tax. However, tax would apply if a business delivers data conversion software on a disc, by load and

leave, electronically, or by another means and the customer is the party responsible for monitoring the software's operation and ensuring successful data conversion. If a customer acquires title to, or the right to use, canned data conversion software, tax applies to the charges for the software.

Information Services and Software - The Kansas Department of Revenue has issued Private Letter Ruling P-2010-009 (November 16, 2010) discussing the applicability of sales tax to various issues relating to information services. Transaction and additional fees, such as copyright, referencing, or customization fees, relating to article sales from scientific, technical, and medical journals to researchers, are taxable since they are included in the total selling price of publications and other printed matter. Article sales arranged and delivered over the Internet are not taxable because electronically downloadable digitized products or information are not tangible personal property. Document transmission software that is not designed to the specifications of an individual customer is taxable as prewritten computer software and software licensing fees paid by customers to remotely use software residing on a client's server is not taxable since the software resides on the remote server located outside Kansas. Staffing services and document management services are not taxable because they are not among the taxable enumerated services.

KENTUCKY

Digital Property Taxable - The Kentucky Legislature has enacted House Bill 347, effective 07/01/2009, which imposes the sales and use tax on digital property. "Digital property" includes electronically delivered digital audio works (such as ringtones or music), digital books, finished artwork, digital photographs, periodicals, newspapers, magazines, video greeting cards, video games, electronic games or any digital code related to this property. Retailers must source the sale of digital property to the place of primary use, which is the address where the end user receives the digital property or from where the end user primarily accesses the digital property.

Prewritten Computer Software - The Kentucky Court of Appeals in *Computer Services, Inc. v. Dept. of Rev.*, Dkt. No. 2009–CA-002012–MR (01/07/2011), affirmed a lower court decision that the taxpayer's prewritten computer software purchased in 2002 was tangible personal property subject to sales and use tax. The Taxpayer provided data management services to financial institutions. Prior to 2004, the taxation of prewritten computer software was based solely on the method in which it was delivered: software delivered via a physical tangible medium was taxable, as was the case here. However, the court determined that the statute as written in 2002, and the accompanying regulations, which specifically included computer software within the definition of tangible personal property gave the Department of Revenue ample authority to tax computer software prior to the amendment of the statute in 2004. The court further noted that the 2004

amendment of the statute was done solely to clarify that all computer software, regardless of the method of delivery, was taxable.

LOUISIANA

Remotely Accessed Software & Digital Media - The Louisiana Department of Revenue has issued Revenue Ruling No. 10-001 (3/23/2010), which is temporarily suspended by Revenue Information Bulletin No. 10-028 (11/15/2010). Revenue Ruling No. 10-001 discussed the taxability of remotely accessed software and digital or media products. Specifically, the Ruling holds that tangible personal property includes all electronically delivered products (e.g. software, applications, stored media and entertainment media) to equipment located within Louisiana. Therefore, ASPs, information services and digital goods are deemed taxable when utilized by Louisiana recipients. Furthermore, all related installation fees, initiation fees, etc. associated with the sale is deemed a part of the sale or lease of tangible personal property and cannot be separately stated to avoid taxation.

Temporary Suspension of Policy Statements Pertaining to Digital Transactions - The Louisiana Department of Revenue has issued Revenue Information Bulletin ("RIB") No. 11-005 (February 14, 2011), which addresses frequently asked questions regarding the Department's temporary suspension of Revenue Ruling No. 10-001 (3/23/2010) and RIB No. 10-015 (6/25/2010). The Department has clarified that: (1) the suspension of Revenue Ruling 10-001 affects only transactions in which the customer pays an access fee or subscription fee to obtain the use but not ownership of a website or software; and (2) the suspension of RIB 10-015 affects only Pay-Per-View and Video-on-Demand movies purchased for viewing by customers of cable television and satellite television providers. The Department of Revenue notes that sales tax continues to be imposed on the sale, use, or lease of canned computer software and software maintenance agreements and that the sale or use of a downloaded digital product such as music, a movie, book or game is a taxable transaction.

MAINE

Sales Price Definition Amended - The Maine Legislature has enacted L.D. 1540 amending the definition of "sale price" under the Maine sales tax exemption provisions. The legislation excludes from the definition of "sale price" the price for labor and services used in installing or applying or repairing the property sold if separately charged or stated. This definition of "sale price" will not go into effect, however, should Maine voters reject the 2009 tax reform legislation at the June 8, 2010, election. If this change does go into effect, it would apply retroactively to January 1, 2009.

MASSACHUSETTS

On-Line Services: Information Services & Computer Software - The Massachusetts Department of Revenue has issued Letter Ruling 11-2 (3/4/2011) discussing the application of Massachusetts sales and use tax on certain online services provided by a New Jersey based company (with locations in New Jersey and Pennsylvania) engaged in the business of providing commercial information about the financial condition of businesses to customers in Massachusetts. The Department ruled that: (1) charges for providing on-line commercial information about the financial condition of businesses to Massachusetts customers was not subject to sales tax; and (2) charges for providing customizable web-based tools that enabled customers to use the company's software to enter data, manipulate the data entered, and acquire and manipulate the information from the company's database was subject to sales tax as a sale of prewritten or canned software.

Digital Authentication Services - The Massachusetts Department of Revenue has issued Letter Ruling 11-3 (3/24/2011) which holds that the taxpayer's sale of authentication services via provision of a digital certificate to its customers for a consideration are not subject to sales and use taxes when provided to customers located in Massachusetts. According to the Department, the authentication services were services which did not involve the transfer of prewritten computer software; the transfer of the digital certificate is not the transfer of computer software. The object of the transaction is a nontaxable authentication service and not any software that enables the provision of those services.

ASPs v. Information Services - The Massachusetts Department of Revenue has issued Letter Ruling 11-4 (4/12/2011) holding that the purchase of Taxpayer's product which aids in an employee application gathering and selection process was not taxable because it was an information service. Taxpayer's product uses software developed by the Taxpayer and remains on the Taxpayer's server. Customers access the product remotely via the Internet. No portion of the Taxpayer's software is delivered to its customers on a tangible medium, nor is any portion electronically downloaded to its customers' equipment. In addition, the Taxpayer does not provide a license of software or confer any rights to use the software to its customers. While the Department notes that ASPs are taxable in Massachusetts, where there is no charge for the use of the software and the object of the transaction is acquiring a good or service other than the use of the software, sales or use tax does not apply. The Department held that the information services provided by the Taxpayer do not involve transfers of prewritten software, either in tangible or electronic form, or a license to use software on a server hosted by Taxpayer or a third party. Therefore, the sale of the Taxpayer's product is not subject to Massachusetts sales and use tax.

MISSISSIPPI

Specified Digital Products Taxable - Mississippi has codified a new law, H. 1461, effective July 1, 2009, which imposes sale and use tax on the selling, renting, or leasing of specified electronically delivered digital products. "Specified digital products" is defined as electronically transferred digital audio-visual works, digital audio works, and digital books. The tax is imposed when: the sale is to an end user, the seller grants the right of use of the products transferred electronically, or the sale is conditioned or not conditioned upon continued payment.

MISSOURI

Software Implementation Services - The Missouri Department of Revenue has issued Private Letter Ruling 5673 (5/22/2009) which holds that a taxpayer's software implementation services included with the sale of computer software are subject to sales tax. The taxpayer writes and sells computer software programs for use in automotive dealerships. Since the software implementation services are mandatory under the taxpayer's purchase agreement with its customers, the services are taxable and the taxpayer must collect and remit sales tax on the sale of the services.

Hosted Software System - The Missouri Department of Revenue has issued Letter Ruling 5753 (8/20/2009) discussing the taxability of a taxpayer's hosting of its software application services in its data centers. The Department held that the monthly managed access fee for the communications connection to taxpayer's data centers is subject to sales tax. The mandatory charges for deployment and support services and the charges for additional support services, market data fees, and pass-through market charges are not subject to sale or use tax when sold as part of the initial sale of the hosted software. The sale of software is not subject to sales or use tax only if delivered electronically.

Electronically Delivered Software Not Taxable - The Missouri Department of Revenue has issued Letter Rulings 5919 (11/24/2009) and 6144 (3/5/2010) which holds that a taxpayer's sale of electronically delivered canned software is not subject to Missouri sales or use tax. Specifically, Letter Ruling 5919 held that since the taxpayer does not leave the purchaser with a tangible copy of the software after installation, and any subsequent field implementation performed on-site will not involve the use of any tangible medium by the taxpayer or leave any tangible medium behind, the original download was not taxable. In addition, charges for separately stated optional consulting, training, and software maintenance agreements, contracted for in connection with electronically delivered computer software and do not involve a tangible medium, are not subject to sales or use tax.

Online Subscription Cards and Point Cards - The Missouri Department of Revenue has issued Letter Ruling 6245 (5/6/2010) which holds that sales of subscription cards by a video game store to play online games are not subject to Missouri sales tax. The amount paid to play the computer games is not subject to tax because playing a computer game is not the transmission of a message or conversation, a taxable event in Missouri. Likewise, the taxpayer's sales of "point" cards that are used to purchase items online through the appropriate company's online store are not subject to sales tax. "Point" cards are similar to retail gift cards, and the true object of the transaction is the ability to purchase an item of tangible personal property in the future. There is no sale of tangible personal property at the time the card is purchased.

Load and Leave Transactions Exempt - The Missouri Administrative Hearing Commission has ruled in *FileNet Corporation vs. Director of Revenue* (No. 07-0146, 8/20/2010) that a database storage company was not liable for use tax on the "load and leave" transfer of software to a Missouri purchaser because software is not tangible personal property. The commission determined that the rules applicable to "canned" software do not apply to "load and leave" transactions and that software is intangible property. Specifically, the commission held that the USB drive that the taxpayer used to transfer the software to its customer was not a tangible medium contemplated by the regulation. In addition, the Commission went a step further and determined that computer software is intangible property not taxable under the general use tax statute.

The applicable computer software regulations specifically provide that the sale of canned software is taxable as the sale of tangible personal property, but this only applies to the sale of canned programs delivered in a tangible medium transferred to and retained by the purchaser. Thus, the administrative ruling appears to exempt all other delivery methods of canned software, including load and leave and electronic delivery. It is anticipated that this decision may be repealed.

Sales of Medical Records Transferred via Facsimile or E-mail Not Taxable - The Missouri Department of Revenue has issued Letter Ruling 6635 holding that an out-of-state healthcare information provider's fees for medical records transferred via fax or e-mail are not subject to sales tax because the transactions do not transfer tangible personal property and the transfer by email or fax is not one of the enumerated services.

NEBRASKA

Website Design, Development and Hosting - The Nebraska Department of Revenue has issued Revenue Ruling 01-10-2 (3/1/2010) which holds that charges by a website service provider for website design and development are exempt unless the website design is transferred to the customer in tangible form. If the website design is retained by the service provider for hosting, or electronically transferred to either a third party hosting

entity or to the customer, the charges are not subject to tax. Furthermore, website hosting services are not among the enumerated taxable services and are therefore exempt.

Delivery Charges - The Nebraska Department of Revenue has updated Information Guide 6-507-2011 discussing the taxability of delivery charges. Delivery charges are taxable when the buyer's transaction with the retailer is taxable and the buyer pays the delivery charge to the retailer. Charges are exempt when the underlying sale of property is exempt or when the buyer contracts with and pays a delivery or freight company. When a delivery charge is associated with both a taxable and a nontaxable transaction, the retailer must separately state the portion of the delivery charge that applies to both the taxable and nontaxable transactions, otherwise, the entire delivery charge is taxable.

NEW JERSEY

Research and Development - The New Jersey research and development sales and use tax exemption explicitly includes sales of digital property. Amendments to Sales and Use Tax Act (P.L. 2008, c. 123) (Jan. 5, 2009).

Taxation of Internet Access - The New Jersey Division of Taxation has issued Technical Bulletin TB-62 (1/29/2009) discussing the effect on New Jersey sales and use tax of the extended federal moratorium on Internet access taxes and multiple and discriminatory taxes on electronic commerce, and of amendments to the definition of "Internet access." While New Jersey also exempts internet access charges, it discusses the specific impact on sellers and purchasers, and discusses the taxability of internet access when bundled with taxable telecommunications charges.

SST Conformity Legislation - New Jersey has enacted SB 2130, effective April 8, 2011, updating the state's sales and use tax laws in order to conform to the Streamlined Sales and Use (SST) Agreement. The bill revises the sales and use tax definition of digital property, provides seller relief from liability due to certain tax rate changes, and makes various other technical corrections and clarifications to the tax to maintain compliance with the SST Agreement.

NEW MEXICO

In-Flight Internet Service Taxable – New Mexico Ruling No. 401-09-2A (3/9/2009) holds that a company that provides airborne communications services is subject to New Mexico gross receipts tax on its sales of Internet services during intrastate flights (i.e. flights that depart from a New Mexico airport destined for a New Mexico airport location). Providing Internet access is providing a service and providing a service on an intrastate flight is providing a service in New Mexico.

Annual Fee to View Webpage Taxable to NM Users - The New Mexico Bureau of Revenue has issued Revenue Ruling No. 401-10-8 (4/20/2010), which holds that an annual fee charged to independent sales agents for use of the taxpayer's web page was subject to the New Mexico gross receipts tax. The annual fee for the website is charged to the agents for the privilege of viewing information about their personal sales. The independent sales agents will not be selling tangible personal property through this web page nor will they be downloading software from it. For gross receipts tax purposes, the location of the license is the place where the agent's access to the Internet exists, which will be assumed to be the agent's business location. When the location of the license is in New Mexico, the seller has gross receipts from licensing property employed in New Mexico.

NEW YORK

Taxability of Software Customized for Airlines Transporting Mail Discussed - The New York Commissioner of Taxation and Finance has issued Advisory Opinion TSB-A-09(6)S (1/30/2009) which holds that customized software specifically developed for airlines transporting mail is not subject to New York sales and use tax. However, the sale of prewritten software would be taxable. The software is transmitted electronically to the taxpayer's airline customers via a server in New Jersey from which the airline customer transmits the software to various locations. Thus, the transfer of the taxpayer's software to its customers in New York would be subject to sales tax if the software is prewritten software. If the software is prewritten and therefore taxable, the taxpayer should collect tax based on the portion of the receipt attributable to the locations in New York where the software is being used.

Automated Voice Message Software and Services Not Taxable - Advisory Opinion TSB-A-09(5)S (1/29/2009) holds that a company's sale of its automated voice message services are not subject to New York sales tax. The taxpayer's company uses software to make these calls, but since the software is not transferred to the customers by download or in a tangible format, the company does not license or sell the software, and it is not subject to tax. Rather, the company is providing an automated calling service that is also not subject to tax.

Online Training Modules Taxable - New York Advisory Opinion TSB-A-09(3)S (1/29/2009) holds that a company's sales of online computer-based training software modules that provide e-learning content and technology products to customers in New York are subject to New York sales tax as prewritten software since the software products are designed for sale to more than one customer.

Web-Based Financial Transaction Settlement Products Taxability Discussed - New York Advisory Opinion TSB-A-09(8)S (2/2/2009) discusses a company's sales of two separate

web-based financial transaction settlement products. The Opinion holds that the products are not information services subject to New York sales tax, however, one of the products constitutes the sale of taxable prewritten computer software.

Use of Online Software Taxable - New York Advisory Opinion TSB-A-09(15)S (8/15/2009) holds that a company's charges to its subscribers for Internet access for the online use of its loan origination and processing software products are subject to New York state and local sales taxes when sold to subscribers located in New York because the product is deemed to be prewritten computer software. The accessing of the taxpayer's software by its subscribers constitutes transfer of possession where the subscriber gains constructive possession of the software as well as the "right to use, control or direct the use" of the software. The situs of the sale for purposes of determining the proper local tax rate and jurisdiction is the location associated with the license to use (i.e., the location of the subscriber's employees that use the software). If the subscriber's employees who use the software are located both in and out of New York, the taxpayer should collect tax based on the portion of the receipt attributable to the employee users located in New York.

Software Developed for Internal Use Taxable Upon Sale - The New York Division of Tax Appeals has held in *In the Matter of the Petitions of Xerox Corporation and Determination XAC, LLC f/k/a Amici, Inc.,* NYS Division of Tax Appeals, ALJ, Dkt. No. 821914 (4/23/2009) that Xerox's sale of a software program, which it developed internally solely for use in operating its online document management system, to an outside corporation as part of a bulk sale was subject to New York sales and use tax as a sale of tangible personal property. Because the software was not designed and developed to the specifications of a single "purchaser," as required by New York law, the sale, therefore, constitutes taxable prewritten software.

Web Based Subscription Service Taxable - New York Advisory Opinion TSB-A-09-18(S) (5/21/2009) holds that web-based subscription service fees paid by the broker dealers to the taxpayer for the purchase of financial evaluation reports are subject to sales tax when the reports are delivered to customers in New York. The information collected from the evaluators by the taxpayer forms a common database that is used to create the reports for broker dealers. The reports sold to the broker dealers were held to be taxable information services. The reports are taxable regardless of whether they are e-mailed to broker dealers or viewed on the taxpayer's website. When the information is delivered by electronic means to customers both inside and outside New York, the receipts subject to the sales tax should be allocated between the two.

Information Services - The New York Tax Appeals Tribunal has ruled in the *Petition of DZ Bank* (Docket No. 821251), that a web-based product that is updated daily and used online by the taxpayer's customers is a taxable information service subject to sales tax under N.Y. Tax Law § 1105(c) . To access this product, the taxpayer was required to

download software provided by the vendor. The taxpayer then enters private portfolio data online, where the taxpayer performs an analysis of the taxpayer's portfolio and provides the taxpayer with a report. The Tax Appeal Tribunal reversed the ALJ's decision and held that the product was a taxable information service.

Online Computer Software Program Taxable - New York has issued TSB-A-09(19)S (5/21/2009) which holds that a taxpayer's online computer software program that provides customers with weekly recommendations based upon weekly sales data supplied by the customer is pre-written computer software subject to sales tax as a sale of tangible personal property. The situs of the sale for purposes of determining the proper local tax rate and jurisdiction is the location of the customer or its agents or employees who use the software. The taxpayer's separate charges for implementation services and technical support, however, are exempt from sales tax because such services involve custom modifications to the software to meet a customer's business needs. Web hosting services are also exempt, so long as such services can be purchased separate from the software.

Prewritten Computer Software Taxable - New York has issued Advisory Opinion TSB-A-09(25)S (6/18/2009) which holds that software developed by the taxpayer for use in homecare is pre-written computer software and, therefore, taxable. The taxpayer developed a software application that allows homecare agencies and subcontractors to schedule and manage prescribed care to the homecare agency's patients. To access the taxpayer's system, the user would enter a license agreement with the taxpayer and pay a fixed fee for each visit to the systems. The agencies may also request training and modifications to the taxpayer's software for a separate fee. The Department held that the taxpayer's software is pre-written computer software because it is not designed and developed to the specifications of a specific customer, and therefore taxable regardless of the medium by which the software is conveyed. Separate charges for training and custom modifications are not subject to sales tax, provided such charges are reasonable and separately stated on an invoice.

Application Service Provider - The New York State Department of Taxation and Finance has held in Advisory Opinion TSB-A-09(33)S (8/13/2009) that application service providers are taxable on their provision of logistics software in New York. According to the Department, the taxpayer's software is taxable because the definition of TPP includes prewritten computer software regardless of the means by which the software is delivered to the customer. The customer's access of the software on the taxpayer's out of state servers constituted a transfer of possession of the software where the customer's gained the "right to use, or control or direct the use" of the software. However, it was held that corresponding implementation and training services were not subject to tax provided that they are sold for a reasonable, separately stated charge. Also, the taxpayer's managed services are not subject to tax because the subscribers do not obtain possession or the right to use the software for such services.

Payroll Software Taxable - The New York State Department of Taxation and Finance has held in Advisory Opinion TSB-A-09(37)S (8/25/2009) that the National Football League's purchases of payroll processing software and related items are subject to New York state and local sales tax as the sale of tangible personal property. The taxpayer pays a monthly license fee to a payroll service provider that uses certain application programs to process payroll checks and track payroll data. The payroll provider also provides physical pay statements and management reports, produces Form W-2's and files the taxpayer's payroll tax returns. The situs of the sale is where the taxpayer's employees use the software. The provider's additional services, however, may be exempt as information services, provided that the charges are reasonable and separately stated.

Taxable Information Services - The New York State Department of Taxation and Finance has issued Advisory Opinion TSB-A-09(40)S (8/12/2009) holding that an independent contractors' compilation of information from electronic sources is an information service under N.Y. Tax Law § 1105(c)(1) and, therefore, subject to sales tax. The taxpayer, an Internet company that provides information to various industries, must collect sales tax on payments to independent contractors who prepare the taxpayer's e-newsletters, which are delivered by email to its users and are posted on its website. The information is compiled from electronic versions of trade publications from multiple publishers. Since the information is collected from publicly available sources on the Internet, the personal and individual information exclusion does not apply.

Software Taxability Discussed - New York Advisory Opinion TSB-A-09(41)S (9/22/2009) holds that receipts from the licenses of prewritten software are subject to sales tax to the extent that the software is used in New York. The taxpayer licenses a basic software insurance package to provide rate quotes, contracts, etc. The software may be modified to meet a customer's needs. In some instances, the taxpayer may also charge its customers a hosting fee to store the software on the taxpayer's servers and for software updates and training and helpdesk support. Since prewritten software is included in the definition of tangible personal property, New York imposes sales tax on the transaction. Accordingly, the taxpayer must collect sales tax on the receipts from its software when the software is accessed by customers located in New York. Hosting and software update fees are an integral component of the license and are therefore also subject to sales tax. Modification and training and helpdesk fees, however, are excludible from sales tax provided that the fees are reasonable and separately stated.

Information Services - The New York Department of Taxation and Finance has issued Advisory Opinion TSB-A-09(55)S (12/7/2009) which discusses information services. According to the Opinion, receipts from the taxpayer's web-based sales of certain retailer's reports are subject to state and local sales tax as receipts from the sale of an information service. The reports were deemed taxable regardless of whether they are e-mailed to its customers or viewed by the customer on the taxpayer's website. Services

are taxed based upon the location to which they are delivered notwithstanding that the service may have been performed elsewhere.

Fees for Computer Video Games Taxable - According to New York Advisory Opinion TSB-A-10(2) (1/20/2010), fees paid to play computer video games at the taxpayer's facility are subject to sales tax as charges for the use of tangible personal property. The computer games offered by the taxpayer to its customers are prewritten software products. Annual fees paid by customers in order to receive discounts on normal fees are also subject to tax because such fees are prepayments for the normal gaming fees.

Information Services - The New York Department of Taxation and Finance has issued Advisory Opinion TSB-A-10(6)S (2/17/2010) which holds that a taxpayer's data mining, data warehousing, and online advertising services are not subject to New York sales and use tax since they qualify as exempt information services. The taxpayer provides its services by compiling data from customer Web sites via internally developed software installed on the customer's Web sites. The software streams data to the taxpayer's servers where it is analyzed and a custom report issued. Pursuant to Tax Law §1105(c)(1), the sale of custom information which is personal or individual in nature is exempt.

Automated Speech Application Programs Taxable - The New York Department of Taxation and Finance has issued Advisory Opinion TSB-A-10(10)S (3/16/2010) which holds that a taxpayer’s sales of automated speech application programs are taxable as sales of prewritten software. The programs are sold to clients to provide automated customer information (e.g., warranty information) via toll-free calls. Delivery of the programs may occur (1) electronically; (2) via a web hosting model; or (3) via ASP. Under the Tax Law, prewritten software is treated as tangible personal property and is therefore subject to sales and use tax. Sales of the automated speech application programs are subject to tax in New York if the clients` employees who use the software are also located in-state. Additional charges for software maintenance and support services are not taxable provided the charges are separately stated and reasonable.

Managed IT Support Services - The New York Division of Taxation and Finance has issued Advisory Opinion TSB-A-10(14)S (4/8/2010) which holds that the packages of managed information technology (IT) support services sold, which are delivered through servers located in New Jersey and administered by connecting to the customer location via the web, are not subject to sales tax. The primary function of such services is to assist a customer in the operation and management of its IT system, which is not among the enumerated services.

Custom Information Services - The New York Department of Taxation and Finance has issued New York Advisory Opinion TSB-A-10(20)S (5/6/2010) holding that litigation support services, despite constituting information services, are not subject to sales tax because they are personal and individual in nature. The taxpayer's support services

include analyzing, compiling, and organizing large amounts on information by the customer. With its online proprietary software, the taxpayer specially compiles the information for its customer. The information may be reviewed online or delivered to the customer on tangible media, including DVDs, CDs, and hard drives. No information or analysis is provided to a third party. Because the information is personal and individual in nature, the information service is excluded from tax.

Foreign Corporation's Online Access Charges Taxable - The New York Department of Taxation and Finance has issued Advisory Opinion TSB-A-10(4)C (5/27/2010) which holds that charges to a foreign corporation's customers for access to the taxpayer's online network that allows customers to establish a telephone call center with off-site personnel are subject to sales and use tax because they constitute receipts from the sale of prewritten computer software. The taxpayer owns software installed on its servers to establish secure networks required to operate a call center. Access to the software constitutes a transfer of possession of the software and is therefore taxable as the sale of prewritten computer software under N.Y. Tax Law § 1105(a) when the customer is located in New York.

Information Services - The New York Division of Tax Appeals has held in *In the Matter of the Petition of Nerac, Inc.*, NYS Division of Tax Appeals, ALJ, Dkt. Nos. 822568 and 822651 (7/15/2010), that a research and advisory firm's scientific and engineering research and tracking services was not subject to sales and use tax because it did not constitute a taxable information service. The taxpayer provided sophisticated consultation, customer research and problem resolution for its clients. The true object of the taxpayer's service was found to be the resulting advice and solution. Since the primary function of the taxpayer's service was not to collect, compile, analyze and disseminate information, the taxpayer was not providing an enumerated taxable information service. Furthermore, even if the taxpayer's service was considered to be an "information service," it would still not be taxable because the information furnished was personal and individual in nature, and was not substantially incorporated in reports furnished to others.

Information Services - The New York Department of Taxation and Finance has issued Technical Service Bureau Memorandum TSB-M-10(7)S (7/19/2010) clarifying the tax treatment of certain information services in New York. The furnishing of information that is personal or individual in nature is excluded from tax. Whether a service qualifies as a taxable information service depends on its primary function. In addition to a general discussion of taxable information services, including examples of taxable and exempt information services, the Department clarifies its policy with respect to the taxability of public documents sold by private entities and changed its positions on abstracts of title and risk management analysis reports. The Department now holds that sales of an abstract of title to real property and risk management analysis reports are taxable as information services, effective September 1, 2010.

Prewritten Software: Taxation and Sourcing Discussed - The New York Division of Taxation and Finance has issued Technical Service Bureau Memorandum TSB-A-10(28)S (7/2/2010) holding that a taxpayer's sales of prewritten computer software was subject to New York sales and use tax and should be sourced based on where the software is used in New York. The location of the code embodying the software is irrelevant because the software can be used just as effectively by the customer, even though the customer never receives the code on a tangible medium or by download. The accessing of the taxpayer's software by the customer's employees constitutes a transfer of possession of the software because the customer gains constructive possession of the software and gains the "right to use, or control or direct the use of" the software. If the customer's employees who use the software are located both in and out of New York, the taxpayer should collect tax based on the portion of the receipt attributable to the employee users located in New York.

Information Services, Software and Support - The New York Department of Taxation and Finance has issued Technical Service Bureau Advisory Opinion TSB-A-10(32)S (7/23/2010) which holds that a company's receipts from the sale of financial data feed services and various online reports are information services subject to New York sales tax. In addition, the taxpayer's license of application software that enables its customers to find, filter, and organize company information from the data feeds is taxable as prewritten computer software. This application software remains a distinct product when sold in conjunction with access to data feeds because a customer can purchase the software or access to the data feed without purchasing the other product and the taxpayer bills a separate charge for the software. Charges for technical support, research support, and training are exempt, provided that customers purchasing the taxable information services are not required to purchase these additional services, and that the receipts for these services are reasonable in relation to the entire charge.

Information Services - The New York Department of Taxation and Finance has issued Advisory Opinion TSB-A-10(38)S (8/20/2010) holding that an information service that collects, compiles, and analyzes information regarding the activity levels of a client's online advertising is not subject to New York sales tax because the services qualify for the exemption for sales of information, which is personal and individual in nature. The information provided to the client is based on the specific activities occurring within the various search engines with respect to that client's ads. Recommendations made to the client are based on the analysis of that client's specific data, and are not based on, and do not include, data relating to activity with respect to other advertisers.

Information Services - The New York State Department of Taxation and Finance has issued New York Advisory Opinion TSB-A-10(40)S (9/15/2010) holding that subscription fees and other charges for use of an Internet professional networking site are subject to sales tax as a taxable information service. The taxpayer operates an Internet

networking website for professionals. Although website membership is generally free, the taxpayer offers certain enhanced services for an additional monthly fee. The taxpayer also offers third-party customers customized online business surveys that are targeted to members. Access to job postings is free. Since the information provided to members is derived from a common data source that is not confidential or personal or individual in nature, fees for such services are subject to sales tax as the sale of an information service. Job postings and virtual job fairs, however, are considered advertising on an Internet website and are therefore nontaxable services.

Software Purchase by In-State User - The New York Commissioner of Taxation and Finance has issued TSB-A-10(44)S (9/22/2010) which holds that a taxpayer's purchase of prewritten software from an out-of-state company is subject to New York sales and use tax based on the portion of the price attributable to in-state users. The out-of-state company that sold the prewritten software to the taxpayer should source its sales to the taxpayer based on the location of the employees who use the software. The out-of-state seller may comfortably rely on information received from the taxpayer to determine the location of the employee users.

Information Services - The New York Division of Taxation and Finance has issued Advisory Opinion TSB-A-10(45)S (9/24/2010) which holds that "peer group analysis" services provided by the taxpayer to firms engaged in the sale of mutual funds, annuities, and securities, which allows a customer to compare itself to its competitors using factors such as industry, size, revenue, and geographic locations, are taxable. The taxpayer compiles information and provides reports to customers about their market share as compared to their peer group. The taxpayer's services are taxable information services since the information is not personal or individual in nature.

Information Services - The New York Division of Taxation and Finance has issued Advisory Opinion TSB-A-10(47)S (9/29/2010) which holds that the electronic transmission of investment holdings and transaction information are not taxable as information services because the information is personal or individual in nature. The taxpayer's services primarily involve the compilation and web-based access to personal financial information for a financial advisor's clients. Even though the information includes market data about the pricing of the assets held by the investor and related bench-marking information, the personal portfolio information predominates and the exclusion applies. The taxpayer's sale of software that allows financial institutions to further analyze an investor's financial information is taxable as the sale of prewritten software.

Information Services - The New York State Department of Taxation and Finance has issued Advisory opinion TSB-A-10(52)S (10/18/2010) to explain that a company's information services constitute both nontaxable data processing and taxable information services. Petitioner's suite of information management services is modular and

transaction-based, which allows its customers to use and pay for only the services they choose. Taxpayer's services which involve only the processing and relaying of information from the client to the intermediary are deemed nontaxable data processing service. Where the primary function of this product is to provide information to the purchaser, the taxpayer is providing a taxable information service.

Amazon Challenge Reinstated - The appellate division of the Supreme Court of New York, first department, has reinstated complaints filed by Amazon.com and Overstock.com against the New York Department of Taxation and Finance challenging the constitutionality of a sales and use tax provision that requires out-of-state Internet retailers with no physical presence in New York to collect New York sales and use taxes. The New York Department of Taxation and Finance then issued a press release on November 12, 2010 responding to the recent state appellate court ruling upholding the New York law requiring internet retailers to collect sales tax on sales to New York customers. Based on the court's ruling, the Department concludes that the new law is "legal and enforceable," unless a retailer can challenge the statute as-applied to its unique factual circumstances.

IT Support Services - The New York Department of Taxation and Finance has issued Advisory Opinion TSB-A-10(57)S (November 16, 2010) which holds that IT support services that include both taxable and non-taxable services are subject to sales tax because the services are provided for a single charge. Services that are performed on hardware and equipment are taxable; whereas, these same services are exempt when performed on computer software. Therefore, when a taxpayer does not separately state the charge for its exempt services, the entire will be subject to sales tax. If, however, the taxpayer charges a customer an hourly fee for solely exempt services, the receipt is not taxable.

Information Services - The New York Department of Taxation and Finance has issued Advisory Opinion TSB-A-10(59)S (November 23, 2010) which holds that a taxpayer's litigation support services, which include collections and forensics, processing, search and review, and document review services for companies and the litigation departments of law firms, are not subject to sales tax because the services are personal and individual in nature. The taxpayer's additional services of targeted data searches, sorting and organizing documents are also excluded from sales tax because they are personal and individual in nature. Moreover, tangible personal property used to provide information to clients is not taxable because it is an integral part of the taxpayer's nontaxable information services.

Application Service Providers - The New York Department of Taxation and Finance has issued Advisory Opinion TSB-A-10(60)S (November 24, 2010) which holds that a taxpayer's sale of litigation support and e-discovery services are taxable as a license to

use prewritten computer software. The taxpayer provides litigation support and e-discovery services by: (1) uploading a customer's electronic information on the taxpayer's servers, and (2) via a secure email portal, allowing customers to use the taxpayer's software to classify, review, and organize documents for production. A customer's access to the taxpayer's software is a transfer of possession of prewritten software because the customer receives a right to use, or control or direct the use of the software. The situs of the software license is where the software is used. The taxpayer's management, consulting, data capture, and training services are not taxable, provided that they are sold for a separately stated and reasonable charge.

Information Services - The New York Department of Taxation and Finance has issued Technical Memorandum TSB-M-11(5)S explaining the department's policy regarding e-books. Specifically, e-books purchased as a single download and meeting other conditions are not taxable information services. For purposes of this policy, the e-book must meet all of the following conditions: the purchase of the product does not entitle the customer to additional goods and services; any revisions done to the e-book are for the limited purpose of correcting errors; the product is provided as a single download; the product is advertised or marketed as an e-book or a similar term; if the intended or customary use of the product requires that the product be updated or that a new or revised edition of the product be issued from time to time, the updates or the new or revised editions are not issued more frequently than annually; and the product is not designed to work with software other than the software necessary to make the e-book legible on a reading device.

NORTH CAROLINA

Prewritten Computer Software (Delivery Method) - Effective January 1, 2010, the sale of prewritten computer software is taxable, regardless of the delivery method, unless it meets any of the following criteria: (a) it is designed to run on an enterprise server operating system; (b) it is sold to a person who operates a datacenter and is used within the datacenter; (c) it is sold to a person who provides cable service, telecommunications service, or video programming and is used to provide ancillary service, cable service, internet access service, telecommunications service, or video programming. The State has not issued clear guidance as to how these exemptions will apply, but intends to do so in the near future.

Digital Goods - Effective January 1, 2010, the following items are subject to tax when accessed electronically: an audio work; an audiovisual work; a book, a magazine, a newspaper, a newsletter, a report, or another publication; and a photograph or a greeting card. The general sales and use tax rate applies to digital property that is delivered or accessed electronically, is not considered tangible personal property, and would be taxable if sold in a tangible medium.

Computer Maintenance Agreements - The North Carolina Department of Revenue has changed its policy with respect to the taxability of computer maintenance agreements, which can be seen in the current North Carolina Streamlined Sales Tax (SST) Matrix (August 2010). Pursuant to the matrix, both mandatory and optional agreements, delivered in tangible form or via electronic download, are taxable. Separately stated customer support services remain exempt. However, these policy changes have not yet been reflected in the states regulations.

NORTH DAKOTA

Digital Goods Exemption Enacted - North Dakota has enacted Senate Bill 2347, effective July 1, 2009, which exempts the sales of items delivered electronically, including specified digital products, from North Dakota sales and use tax. "Specified digital products" means digital audio-visual works, digital audio works, and digital books. Definitions for these digital products conform to the Streamlined Sales and Use Tax (SST) Agreement are created. Prewritten software is excluded from the definition of "digital products", and remains taxable.

OHIO

Sourcing Rules - Ohio has enacted House Bill 429 requiring that all vendors use origin-based sourcing beginning January 1, 2010 for all intrastate sales, but eliminates origin-based sourcing for sales that are not conducted in intrastate commerce. The new legislation is intended to conform Ohio's sales and use tax laws to the Streamlined Sales and Use Tax (SST) Agreement origin sourcing rules. Vendors who have already implemented destination-based sourcing and who must go back to origin sourcing for intrastate sales may be entitled to a one-time compensatory payment.

Computer Training Taxable - The Ohio Judiciary has held in *Global Knowledge Training, LLC v. Levin* (Ohio Bd. of Tax Appeals, No. 2006-V-47, 7/28/2009) that a range of computer hardware and software applications provided by the taxpayer to its clients were subject to tax. "Computer services," including the training of computer programmers and operators, are taxable in Ohio if they are provided in conjunction with and to support the operation of taxable computer equipment or systems.

Furthermore, the Ohio Supreme Court has affirmed in *Global Knowledge Training, LLC v. Levin* (Dkt. No. 2009-1543) (09/23/2010) the assessment of use tax on computer-related training courses it provided. According to the Supreme Court, training courses on routers and switches offered by the taxpayer were taxable because the statute levied tax on instruction provided to support the operation of computer systems. The statute

specifies that tax applies when computer services are purchased for use in business. In this case, the taxpayer's corporate clients purchased the training to enable their employees to operate computers and computer systems in the course of their employment, and consequently, the training courses were subject to tax. However, courses on programming languages used in web/network applications were not subject to tax because they involved training for non-taxable application software.

Sourcing Rules Amended - The Ohio Department of Taxation has issued Information Release ST 2009-03 which discusses a few changes to the way sales of tangible personal property and taxable services are sourced, effective Jan. 1, 2010, in conformity with the Streamlined Sales Tax Agreement. These changes are reflected in Ohio Revised Code Section 5739.033(B), and will allow Ohio to retain origin sourcing for most sales of tangible personal property made by Ohio vendors to Ohio consumers. Other sales will be sourced to the location where the consumer receives the property or service that was sold pursuant to R.C. 5739.033(C). Leases and rentals will continue to be sourced according to the provisions of R.C. 5739.033(I). For the majority of vendors, these changes will mean little, if anything, to their method of doing business.

PENNSYLVANIA

Pennsylvania Supreme Court Decision on Canned Software Licenses Issued - The Pennsylvania Supreme Court has held in *Dechert LLP v. Pennsylvania* (922 A.2d 87, Pa. Cmwlth. Ct. 2007) that purchases of canned computer software licenses were subject to PA sales and use tax because canned software is considered tangible personal property and the definition of "sale at retail" specifically includes a grant of a license to use tangible personal property. The Court declined to adopt the essence of the transaction test as the Commonwealth Court did in *Graham Packaging Co., L.P. v. Pennsylvania*. Rather, the Court found that other factors supported the conclusion that the Legislature intended to tax canned software as tangible personal property.

ASP's Not Taxable - The Pennsylvania Department of Revenue has issued Letter Ruling SUT-10-005 (11/8/2010) holding that ASP's are not taxable in the Commonwealth. The taxpayer provides Web-based services that enable subscribers to access their software remotely, conduct online meetings and seminars, and provide technical computer support to their customers. Customers access the services via the taxpayer's Web site by downloading an applet that allows them to connect to the taxpayer's system. No software other than the applet is transferred to customers, and customers cannot access the taxpayer's software code or manipulate the software in any way. Such services are not subject to tax because access to the software is provided solely over the Internet, the software is not hosted on a server located in Pennsylvania, and the only tangible media transferred to the purchaser is the applet for which there is no charge. If any canned software applications are hosted on a server in Pennsylvania, the software is taxable to

the taxpayer as a provider of computer services. If the customer's access is evidenced by a "license to use" the software, the charges are taxable at retail when the software is hosted on a server in Pennsylvania.

SOUTH CAROLINA

Online Subscription Services - The South Carolina Department of Revenue has issued Private Letter Ruling 10-2 (7/29/2010) which holds that online subscription services provided by a Web-hosting service are subject to South Carolina sales and use tax because they qualify as communication services. South Carolina law includes "communications" within the definition of tangible personal property, and the Department of Revenue has found taxable database access transmission services, such as credit reporting/research services and legal research services. The taxable charges include implementation fees for Web-site development, subscriber fees for maintenance and hosting, and mailbox fees. The Department found that these subscription services are taxable because these charges are for access to, and use of, a communication system or service. Charges for subscription services should be sourced to the business location of the end user.

SOUTH DAKOTA

Sourcing Software Sales - The South Dakota Department of Revenue and Regulation has amended and issued administrative rules that explain the sourcing rules for determining South Dakota sales tax collection obligations in transactions that involve software term licenses or subscriptions and software maintenance contracts. Under revised Regulation 64, when a computer software maintenance contract is sold along with the software, the retail sale is sourced to the address where the sale occurred. The retail sale of a computer software maintenance contract by a seller that occurs after the software sale or the renewal of such a contract are each treated as transactions separate from the software sale and are sourced under general South Dakota sourcing rules. Initial payments made in connection with a software term license or software subscription are sourced to the seller's business location if the product is received there or to the location where the buyer received the product. If the initial payment is sourced to the location where the buyer received the product, the seller may source a subsequent license payment to the same location where the initial payment was sourced.

Nexus Definition Expanded - The South Dakota Governor has signed into law S. 147, effective February 1, 2011, that expands the definition of nexus for the purpose of collecting South Dakota sales and use tax and also requires retailers that are not registered to provide notice that South Dakota use tax is due on electronic purchases. The legislation also includes within the definition of "retailer subject to tax" any retailer making sales of tangible personal property to purchasers in South Dakota by mail,

telephone, the Internet, or other media that has a contractual relationship with an entity to provide and perform installation, maintenance, or repair services for the retailer's purchasers within South Dakota.

TENNESSEE

Taxability of Digital Goods and Software Installation Services – As a result of the passage of Senate Bill No. 4173, effective January 1, 2009, sales tax will apply to the retail sale, lease, license, or use of electronically transferred digital goods, which includes music, books and movies. Digital goods will be subject to local tax at the standard local rate. Tax will not apply to satellite radio services, or to subscriptions to data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by electronic transmission to a purchaser, where the purchaser's primary purpose for the underlying transaction is the processed data or information. Digital goods provided without charge for less than permanent use are also not taxable.

Under the legislation, Tennessee will now expand its taxability of leases and rentals to include all leases and rentals of computer software. Computer software repair and installation services are also now subject to tax, regardless of whether the installation is incidental to a sale of software or tangible personal property, or whether any computer software or tangible personal property is transferred in conjunction with the installation service.

In-House Software Exemption - The Tennessee Court of Appeals has held in *Teksystems, Inc. v. Farr* (Tenn. Ct. App., Dkt. No. M2008-01909-COA-R3-CV, 2009) that software-related services performed by temporary employees qualified for the in-house exemption from sales tax. While Tennessee typically imposes sales tax on the transfer, installation, maintenance or repair of computer software and on loading of directions or information onto a computer by a third party, the "in-house exemption" outlined in Tenn. Code Ann. § 67-6-102(36)(B) provides that the fabrication of software by a taxpayer for the taxpayer's own use or consumption is not a taxable use. The "in-house exemption" extends to services provided by agents of the taxpayers. Accordingly, the software services performed by the petitioner's contract employees were exempt from the sales tax on computer software under the "in-house exemption."

TEXAS

Taxable Computer Programs - The Texas Court of Appeals has held in *Verizon North, Inc. v. Combs* (Docket No. 03-08-00151-CV) that a corporation was not entitled to a refund of sales and use taxes paid on the license for computer software that it configured to perform the business functions for which it was purchased since the software was

deemed tangible personal property subject to tax. The software was a computer program under the statutory definition of "a series of instructions that are coded for acceptance or use by a computer system and that are designed to permit the computer system to process data and provide results and information." Although the software was not purchased as a completed program, it was sold as a completed program, and therefore constituted tangible personal property subject to tax.

7-Eleven, Inc. Decision Withdrawn - The Texas Court of Appeals has withdrawn its previous decision in 7-*Eleven, Inc. v. Combs*, (Tex. Ct. App., 3rd Dist., Dkt. No. 03-08-00212-CV, 2009), regarding the sales tax treatment of financial software that was purchased by a Texas company and transferred to company stores located outside the state, because a threshold question has been presented on rehearing by the State as to precisely what a store owner had purchased and whether that purchase could properly be allocated between the owner's franchise and other company stores. In its motion for rehearing, the state argued for the first time that software-development charges for store software could not be allocated in the manner urged by the store owner because the license agreement for the software provided for a single charge for a single license, rather than a price per copy. The court concluded that it was required to remand the cause for a determination of the threshold issues raised by the state and any further proceedings to resolve the fact issues regarding the alleged use of the store software before declaring the purchase exempt.

Data Processing Services - The Texas Comptroller has issued Decision No. 100,797 (10/21/2009) denying a refund claim for data processing services purchased to support the taxpayer's proprietary software it sells where the taxpayer failed to provide the proper books and records that would support a finding as to how the services at issue were used for purposes of the multi-state benefit exemption. This exemption requires clear and convincing evidence that the taxpayer operates in more than one state, and that the purchased service supports a separate, identifiable segment other than general administration or operation of the business. The mere fact that a taxpayer operates in multiple states does not mean that services purchased by a taxpayer in Texas were partly used outside of Texas.

Data Processing Services - The Texas Comptroller of Public Accounts has released Decision, Hearing No. 100,893 (4/30/2010), which holds that real estate lease management services provided by a Texas company were data processing services subject to Texas sales tax rather than nontaxable professional or consulting services. Taxpayer analyzes pertinent information and prepares handwritten abstracts that are then entered into the taxpayer's Internet-accessible software system. Clients are granted a license to access and use the taxpayer's online information, which were considered taxable as data processing services where the ultimate objective of the transaction was not the abstract itself, but access to the processed and stored data on the taxpayer's website. In addition, the Comptroller found that there was no proof that the taxpayer's

minor charges for consulting and strategic planning services were unrelated to the taxable data processing services, and therefore were also taxable.

UTAH

Data Recovery Services - The Utah State Tax Commission has published Private Letter Ruling 07-013 in which in held that a the taxpayer's on-line information backup and recovery service did not constitute the sale of tangible personal property, nor was it among those enumerated services taxable under Utah law. Under the facts at issue, the taxpayer's services did not constitute the repair or renovation of tangible personal property nor was the remote backup of computer data deemed a lease or rental of tangible personal property. Also, prewritten software provided to the taxpayer's customers enabling access to the backup services was not taxable, as it was merely incidental to such service.

Computer Software Regulation Revised - The Utah Department of Revenue has reissued computer software Regulation 865-19S-92, effective January 1, 2009. The revised regulation provides that the sale, rental or lease of custom computer software constitutes a sale of personal services and is exempt from the sales or use tax regardless of the form in which the software is purchased or transferred. Charges for services such as software maintenance, consultation in connection with a sale or lease, enhancements, or upgrading of custom software are exempt from tax. The sale of computer generated output is subject to the sales or use tax if the primary object of the sale is the output and not the services rendered in producing the output. "Computer-generated output" means the microfiche, microfilm, paper, discs, tapes, molds, or other tangible personal property generated by a computer.

Sourcing of Services - The Utah legislature has enacted House Bill 58, effective 07/01/2009, which provides that a seller may elect to determine the sourcing location of a sale, lease or rental of a service where the seller makes a sale or lease of tangible personal property that is transferred electronically.

Software Related Services - The Utah State Tax Commission has amended Private Letter Ruling 08-002 (6/10/2009) which discusses the application of Utah sales tax to a company's sale of a software-supported automobile dealership management service. Under newly explained facts, the Commission held that a one-time set-up fee and a training fee charged to the customers with respect to the software were not taxable because they were optional and not "necessary to complete the sale" as described in the statutory definition of "purchase price." Monthly licensing fees for software updates and fees charged to access the software were taxable as charges for services rendered in connection with the sale of prewritten software.

Application Service Providers - The Utah State Tax Commission has issued Letter Ruling 09-003 (2/13/2009) which holds that access to the taxpayer's customer relationship management (CRM) software, which is located on the taxpayer's servers outside Utah are not subject to Utah sales tax. Utah imposes sales tax on the sale of a product that is transferred electronically if that product would have been subject to tax had the product been transferred in a manner other than electronically. The sale would be subject to sales tax if the sale is made in the state. Since the sale of the prewritten computer software (CRM) occurs outside Utah, the sales are not subject to tax. The taxpayers' customers are remotely accessing the software without downloading the software onto a computer located in Utah; such access does not create possession of the software in Utah.

Bundled Transaction – The Utah State Tax Commission has issued Private Letter Ruling 09-005 (2/11/2009) holding that one of two payroll service subscriptions that included access to a software tool for previously purchased accounting software should be taxed on the entire sales price as a bundled transaction unless the taxpayer can show a separate, itemized amount for the nontaxable portion of the sales price in their books and records. The transaction fell within the statutory definition of a bundled transaction because it was a sale of tangible personal property or a product subject to tax and services not subject to tax for one non-itemized price.

Web Design Services - The Utah State Tax Commission has issued Private Letter Ruling 09-002 (11/10/2008) which explains that charges for web site design are not subject to Utah sales and use tax if the object of the transaction is the expertise of designing the site rather than the purchase of a web site with the design services being a secondary factor. However, if the web site design involves merely the bundling of pre-existing programs, the commission may consider the transaction to be a taxable purchase of canned computer software.

Web Search Portal Equipment Exemption - The Utah State Tax Commission has issued Rule R865-19S-122 (9/23/2010) which addresses the sales and use tax exemption enacted earlier this year for purchases or leases of machinery and equipment that are used in the operation of a Web search portal. The rule defines the terms "establishment," "machinery and equipment," and "new or expanding establishment," and provides guidance for when the exemption applies, such guidance being consistent with the criteria for the sales tax exemption for a manufacturing facility.

Repair and Installation - The Utah State Tax Commission has amended Rule R865-19S-78 (9/17/2010) discussing charges for labor and repairs under extended warranties and service plans. The rule states that the following charges are taxable: (1) service plan charges for a future taxable repair, and (2) deductible charges made to customers for the customer's share of repairs done under the service plan, including extended warranty agreements and maintenance agreements. The amended rule also defines "installation charges" and "repair or renovation of tangible personal property." Further, sellers of

service plans in connection with tangible personal property and electronically transferred property may also rely on their books and records when items are not separately stated on an invoice. NOTE - The Utah Tax Commission has issued in late October a notice to inform the public that it is allowing the lapsing of amended Rule R865-19S-78 without enactment. The amended Rule discussed changes for repair and renovation of tangible personal property or property transferred electronically. The Commission is working on new changes for the rule.

Rescinded Private Letter Ruling on Automobile Dealership Management Software & Services - Effective December 1, 2010, the Utah State Tax Commission rescinded Utah Private Letter Ruling 08-002 (6/10/2009), which ruled on the sales tax treatment of automobile dealership management software and services, including software-supported service for automobile dealerships that help automate the dealership's sales, parts, accounting, and other functions.

Maintenance Contracts - The Utah State Tax Commission has amended Utah Admin. R. R865-19S-78, "Service Plan Charges for Labor and Repair", effective January 27, 2011, clarifying that service plan charges for future taxable repairs are subject to sales tax. Sales tax must also be collected on any deductible charged to a customer for the customer's share of the repair done under the service plan. Service plan charges for items of tangible personal property that are converted to real property are not taxable. However, service plan charges for tangible personal property that is permanently attached to real property are treated as follows: service plan charges for labor are not taxable; and (2) service plan charges for parts are taxable unless the parts qualify for an exemption.

Products Transferred Electronically - Utah has enacted legislation, L. 2011, H.B.35 (effective 07/01/2011), which amends provisions concerning exemption certificates to conform with changes in the Streamlined Sales and Use Tax (SST) Agreement; changes how Utah delegates for the SST Governing Board are chosen; and amends the definition of a "product transferred electronically" and the location of certain software transactions for sales and use tax purposes.

VERMONT

Computer Software, Services, Web-Hosting and ASP's - The Vermont Department of Taxes has issued Technical Bulletin TB-54 (9/13/2010) discussing the sales tax treatment of computer software and services. Specifically addressed: the imposition of tax on the digital download of "specified digital products", including digital audio-visual works, digital audio works, digital books, and ringtones; the imposition of tax on sales of prewritten computer software, regardless of the method of delivery; exempt services; and the taxability of web-hosting services and ASP's. Pursuant to the Bulletin, the Department has effectively changed its policy with regard to the taxation of ASP`s and web hosting services by taxing both.

Maintenance Services - The Vermont Department of Taxes has issued Technical Bulletin TB-58 (1/3/2011), which discusses the applicability of sales tax on service contracts and warranty agreements. The sale of a service contract to provide labor only for the repair of tangible personal property is not taxable. When the service is performed, the customer should be charged for parts and the sales tax on the parts. On a service contract that includes the replacement of parts, the service provider may charge the customer tax at the time the contract is sold or may sell the contract without charging or collecting tax. If tax is charged at the time the contract is sold, no additional tax should be collected from the customer at the time repairs are made or property is replaced under the contract. A service contract for labor to be performed with respect to real property is not taxable. The contractor must pay use tax on the parts and equipment incorporated into the real property during the service call. The tax treatment of warranties is similar to the tax treatment of service contracts. The replacement of tangible personal property under a warranty is treated the same as the provision of parts for the repair of that property. A warranty that provides for product replacement is taxable, but the replacement of property under such a warranty is not taxable to the extent the replacement is not subject to additional customer charges. A warranty that includes only labor in the repair or replacement of tangible personal property is not taxable.

Website Hosting Not Subject to Sales Tax - The Vermont Department of Taxes has issued a correction to Technical Bulletin 54 which previously held that website hosting services were subject to tax. Generally, pre-written software and digital downloads of specified digital products are taxable. Software maintenance and service contracts, and computer services that do not result in the downloading of or access to, pre-written software are exempt. Previously, the bulletin stated that if a website design is maintained on a remote server, the design is not subject to tax, but the continued use and access to the website or the hosting of a website is subject to sales tax. This revision reverses the instruction that website hosting is subject to the sales tax.

Computer Software and Services - The Vermont Department of Taxes has revised Technical Bulletin TB-54 (4/11/2011) which discusses the tax treatment of software and certain computer services, including internet access and digital downloads. Vermont sales tax is imposed on sales of TPP, including software, and specified digital products. The Technical Bulletin discusses, specifically, the taxability of prewritten computer software, custom software and computer services including training, diagnostic services, computer maintenance contracts, information services, and web hosting and design services.

VIRGINIA

Electronically Delivered Software Not Taxable - The Virginia Department of Taxation has issued P.D. 09-83 (5/28/2009) which holds that a software developers charges for

prewritten software programs delivered electronically were not subject to Virginia retail sales and use tax. The contract at issue specified a required method of electronic delivery. While the software maintenance and support terms set out in the contract defined the supported methods of electronic transfer as potentially including CD-ROMs or diskettes, such maintenance terms were not integrated into the contract's statement of work as to apply to the original transfer of the software at issue.

Out of State Software Provider - The Virginia Department of Taxation has issued Public Document Ruling 09-169 (10/23/2009) which discusses the taxability of an out-of-state software licensor's installation of software on servers located in Virginia. The Department held that if the company is a service provider in Virginia, then it is generally liable for the tax on all servers, software and any other tangible personal property used in Virginia for its provision of services. In such instances, a tax credit against the Virginia sales and use tax would be available for the tax legally paid to another state. However, When the company engages in the rental or lease of servers with licensed pre-written software to Virginia customers, it maintains a continuous physical presence in Virginia that regularly and intentionally makes use of the Virginia marketplace. The company's payment of use tax to its home state on the servers would appear to be unjustified because the property is leased or rented in Virginia. In such instances, no credit against the Virginia use tax due would be allowed for the sales or use tax erroneously paid to the home state.

Data Center Exemption - The Virginia Department of Taxation has issued Ruling 10-121 (6/29/2010) holding that the new data center exemption from retail sales and use taxes, effective July 1, 2010, applies to various equipment and tangible personal property that a taxpayer purchased for use in its qualifying data center, but does not apply to general upgrades to the facility. Similarly, fencing around the data center for safety and security would be taxable. Associated professional fees are not tangible personal property and would not be subject to tax.

Online Tutorial Services - The Virginia Department of Taxation has issued Ruling of Commissioner P.D. 10-162 (8/6/2010) holding that a fee charged by a company for the use of computers it provided as part of its online tutorial service for students was not subject to Virginia retail sales tax because the true object of the transaction was the tutorial service, and not the use of the computer. The computer was provided as a mere convenience to the student and was not crucial to the transaction. In fact, the tutorial service could also be accessed from any other computer available to the student.

Taxability of Computer Software and Add-On Modules - The Virginia Tax Commissioner has issued Ruling 10-241 (10/4/2010) which holds that a computer software company's sales of software on CD are subject to sales and use tax, however the optional add-on modules transmitted electronically are exempt from sales tax. The sale at issue included the sale of software, training and support services, and subscriptions.

Applying the true object test, the Commissioner ruled that the entire sale was taxable where the true object of the sale at issue was the software. Optional add-on modules delivered electronically and subsequent training services, not included with the original sale, were exempt from tax.

Software Maintenance Contracts - Virginia has issued Ruling of the Tax Commissioner No. 11-60 (4/15/2011) explaining that a taxpayer's purchase of software support services was taxable because tangible personal property was transferred along with the service agreement. Maintenance contracts that provide for the furnishing of both repair or replacement parts and repair labor are a combination of taxable sales and nontaxable services, and are taxable at 50%.

WASHINGTON

Computer Services Regulation - The Washington Department of Revenue adopted rule WAC 458–20–15501 which provides a comprehensive guide to taxation of computers and related services. It gives definitions of computer hardware, computer software (including the distinction between prewritten and custom software), information services, and other computer services. The Rule, effective January 16, 2009, provides several example situations.

Digital Goods - Effective July 26, 2009, sales or use tax applies to all digital products, regardless of how they are accessed. In addition to downloaded digital goods, the tax applies to streamed and accessed digital goods, digital automated services, and remote access software. The taxability of these goods does not depend on whether the purchaser acquires a permanent or nonpermanent right of use.

Temporary Staffing Services - The Washington Department of Revenue has issued Special Notice 08/11/2009 which requires temporary staffing businesses to collect sales tax from customers when they provide temporary workers who perform taxable retail services. Examples include construction services for landowners, landscape maintenance and installation, canned software installation, repair of tangible personal property, hardware repair and maintenance, and fixture installation. In some cases specific exemptions may apply, such as repairs to qualified manufacturing equipment. If a temporary staffing business does not collect retail sales tax when it provides temporary workers to perform taxable retail services, the customer is responsible for reporting and paying use tax.

Data Center Exemption - The Washington Department of Revenue has issued Special Notice 05/11/2010 providing guidance on the sales and use tax exemption for some businesses on purchases of certain server equipment and power infrastructure for use in eligible computer data centers. Businesses qualifying for the exemption are for-profit

business entities that own an eligible computer data center or lessees of at least 20,000 square feet within an eligible computer data center dedicated to housing working servers. Eligible data centers must be located in a rural county and must comprise one or more buildings with a combined square footage of 100,000 square feet, constructed or refurbished specifically, and used primarily to house working servers. Eligible equipment includes original server equipment installed in a qualifying computer data center on or after April 1, 2010, and replacement server equipment.

Data Center Exemption Equipment Clarified - The Washington Department of Revenue has issued Excise Tax Advisory No. 3163.2011 (3/15/2011) clarifying the type of equipment that will qualify as eligible server equipment for purposes of the data center exemption. In order to qualify for exemption, networking equipment and data storage devices must meet the following criteria: (1) it must perform a processing function as part of their specialized communication and storage functions; and (2) it must be contained within a server chassis. "Networking equipment and data storage devices" include routers, switches, hard drives, and other devices used in data storage management.

Digital Automated Services - The Washington Department of Revenue has issued a Special Notice on November 2, 2010 which holds that online searchable databases (OSD) (i.e. online legal research services) are digital automated services and therefore do not qualify for the sales tax exemption for digital goods used only for a business purpose. OSD's are digital automated services since they are transferred electronically and use at least one software application. The department will accept prior reporting of sales as taxable or exempt but will enforce the current policy beginning January 1, 2011.

Digital Goods - The Washington Department of Revenue has released Excise Tax Advisory No. 9003.2010 (November 30, 2010) which summarizes the proper method to determine the sales and use taxability of digital products and remote access software. A decision tree is also provided displaying the tax treatment of an electronically transferred good, taking into consideration factors such as potential exclusions, exemptions, and sourcing.

Electronically Delivered Photographs Considered Digital Goods – The Washington Department of Revenue has issued "Tax Topics - Sale of Photographs" (2/15/2011) on the applicability of Washington sales and use tax to the sale of photographs. Photographers selling images to customers in print or delivered via CD, USB drive or other media must collect sales tax. Photographs transferred electronically qualify as digital goods and, therefore, are also taxable. Examples of electronic transmission include delivery via email or other electronic file transfers and providing images for download from a website.

Information Services - The Washington Supreme Court has issued a decision in *Qualcomm, Inc. v. Washington State Dept. of Rev*. (Wash. S. Ct., Dkt. No. 83673-6,

03/10/2011). The Court held that gross receipts from the taxpayer's vehicle tracking system were taxable at the "information service" business and occupation (B&O) tax rate, rather than the "network telephone service" rate. The Court adopted the "primary purpose of the purchaser" rule for services involving both the collection and processing of data and the transmission of data to determine which rate should apply. The Court's decision reverses a Court of Appeals' decision that held that the network telephone service rate applied.

WISCONSIN

Exemption for Internet Broadband Equipment - The Wisconsin Legislature has enacted legislation (S.B. 483) creating a sales and use tax exemption for purchases of Internet equipment used in the broadband market. Such equipment is exempt from Wisconsin sales and use tax, provided that the purchaser certifies to the Wisconsin Department of Commerce that it will make an investment that is reasonably calculated to increase broadband Internet availability in Wisconsin. The investment must be made by June 30, 2009. Within 60 days after the end of the year when the investment is made, the purchaser must file with the Department of Commerce a report that provides a detailed description of the investment and the amount of the investment.

Integrated Business Software Exempt as Custom Software - The Wisconsin Supreme Court has ruled in *Menasha Corporation v. Wisconsin Department of Revenue* , No. 2004AP3239 (7/11/2008) that an SAP implementation which had to be significantly modified before it could be used by the purchaser was exempt from Wisconsin sales and use tax as custom software. The court of appeals, upholding a Wisconsin Tax Appeals Commission determination, held that pursuant to the definitions of "custom programs" and "prewritten programs," the distinction between custom and prewritten software programs hinges on the amount of effort necessary to make the software operational for a particular customer's needs. Although the base of the software program is used by thousands of different businesses, the system always has to be modified to fit a client's particular business needs. In the present case, the seller and various consultants made over 3,000 modifications to the purchaser's software before the purchaser could use it as intended.

SST Conformity - Effective October 1, 2009, Wisconsin sales and use tax laws are conformed to the Streamlined Sales Tax (SST) Agreement. The state must be found in compliance with the Agreement by the SST Governing Board before it can become a full member of the Agreement.

Under the new rules, sourcing is destination based. Sourcing provisions for leases, software and services delivered electronically, and some telecommunications services, are changed. Furthermore, sales and use tax will be imposed on certain digital goods.

Taxable digital goods include digital audio works, digital audiovisual works, digital books, greeting cards, finished artwork, periodicals, and video or electronic games. Digital goods that would be exempt if sold in tangible form are exempt. Also, sales and use tax will once again be imposed on significantly modified computer software that was ruled exempt in the 2008 Menasha decision.

ASPs Not Taxable - Wisconsin Private Letter Ruling No. W0921002 (3/6/2009) holds that tax did not apply to ASP charges paid by Wisconsin customers. The ASP provided logistical management services using computers outside Wisconsin, which customers could access through the Internet using their own computers and without having to install any special software. It was held that tax did not apply because the customers were not located on the premises where the taxpayer's computers were located and did not operate or control the computers. As the taxpayer's services were not taxable, related implementation and training services were similarly non-taxable.

Digital Goods - The Wisconsin Department of Revenue has issued Publication 240 (10/2009) describing in detail the taxation of digital goods, effective October 1, 2009.The publication provides extensive definitions of digital goods and digital codes. It also discusses sourcing provisions and applicable exemptions.

Temporary Help Services - The Wisconsin Tax Appeals Commission has held in *Manpower, Inc. v. Wisconsin Dept. of Revenue* (WTAC Dkt. No. 05–S-046) that a taxpayer providing temporary employees to customers was not subject to tax on amounts charged for workers that performed taxable services for the customers. This decision effectively reverses the Department of Revenue's "look through" position, which looks at the taxability of the work which the temporary employees perform. A review of the services being performed by the temporary employees showed that these services were not the same as the enumerated taxable services in the Wisconsin statutes.

Application Service Providers and Computer Services - The Wisconsin Department of Revenue has issued Private Letter Ruling W1025002 (3/24/2010) which holds that service fees charged by a corporation that markets and maintains a software-supported service for its customers that helps automate the customer's sales, parts, accounting, and other functions, are not subject to Wisconsin sales or use taxes. Application service fees are not subject to Wisconsin sales or use tax when: (1) the persons or the person's employees who have access to the software are not located on the premises where the equipment/software is located and do not operate the equipment or control its operation; and (2) software that is downloaded or physically transferred to the customer or the customer's computers is incidental to the data processing services.

With regard to support fees, the taxpayer is not providing a taxable service when it is providing technical support via the Internet and telephone. Note that telephone support that consists of the taxpayer's support personnel providing a service to its customer's

equipment or pre-written software is subject to tax. Setup services that consist of data configuration and data processing, forms programming fees and data migration fees are not subject to Wisconsin sales or use taxes since they are among the enumerated services. Training fees are not taxable and other fees that the taxpayer charges its customers relating to the installation of software maintained on out of state servers are not subject to Wisconsin sales or use taxes.

Temporary Help Services - The Wisconsin Department of Revenue has issued Tax Bulletin 165 (2/2010) which clarifies the Department's position on the taxability of temporary services following the decision rendered in *Manpower, Inc. v. Department of Revenue* where it was held that temporary help services are not taxable services under Wis. Stat. § 77.52(2). Based on the *Manpower* decision, the Department has set forth a list of factors that may be used to determine whether a seller's services are nontaxable temporary help services. Generally, a taxpayer who furnishes services listed in Wis. Stat. § 77.52(2) are liable for sales tax on its sales price derived from such services unless the following three criteria are met: (1) the seller is either a "temporary help company," an "employee leasing company," or a "professional employer organization"; (2) the seller describes itself as a temporary help, employee leasing, professional employer organization, or staff augmentation business, is a member of a group or association for such organizations or is classified under NAICS as a temporary help service establishment or professional employer organization; and (3) the seller does not provide the services its workers perform directly to customer, the seller's training is generic rather than geared to the specific need of one of its clients, the seller does not furnish the tools or equipment for workers to perform tasks, the seller does not control the location where the work is performed or the employees performing the tasks and does not supervise the activities its workers perform, and the seller does not guarantee a specific result of work performed. Several examples are provided to illustrate what constitutes such nontaxable temporary services.

WYOMING

Sourcing Rules Changed - Wyoming officially became a full member of the Streamlined Sales Tax Project effective January 1, 2008, and as a result, adopted new legislation that aligns its sourcing rules with the sourcing rules of the Streamlined Project. The general sourcing rule provides that when a product or service is received by the purchaser at the business location of the seller, the sale shall be sourced to that business location, and when the product or service is not received at the seller's business location, the sale shall be sourced to the location where receipt by the purchaser occurs. When neither scenario is applicable, the seller is required to charge sales tax based on the customer's address, and if the address is not available, the sales tax is based on the address the item was shipped from.

Digital Goods - Effective July 1, 2010, Wyoming has enacted H.B. 29 which imposes sales and use tax on specified digital products if the purchaser has permanent use of the products.

Digital Goods - Effective July 1, 2010, sales tax is imposed on the retail sale of specified digital products within Wyoming if the purchaser has permanent use of the product. As reiterated by the Wyoming Department of Revenue's June 2010 publication of "Taxing Issues", "specified digital products" are defined as digital audio-visual works, digital audio works, and digital books that are transferred electronically. These products are not taxable when the purchaser does not have permanent use or if the product is purchased by a vendor for further commercial broadcast, transmission, licensing, distribution, or exhibition in whole or in part.

Guidance on Labor Charges Issued - The Wyoming Department of Revenue has released a new issue of Wyoming Taxing Issues, December 2010, which discusses, generally, that labor associated with services to repair, alter, or improve tangible personal property is taxable in Wyoming. Labor performed on real property is not subject to sales tax.

Data Processing Service Center Exemption Amended - The Wyoming Governor has signed into law H.B. 117, effective February 18, 2011, amending the sales and use tax exemption for computer equipment necessary for the operation of a data processing services center to add prewritten and other computer software and containers used to transport and house computer equipment to the list of qualifying exempt items. To qualify for the new exemption, the purchaser must show that it (1) will make an initial total capital asset investment of at least $50 million in a physical location in Wyoming or (2) has made a capital investment of at least $50 million in a physical location in Wyoming in the five years preceding April 1, 2011.