18th ANNUAL PAUL J. HARTMAN SALT FORUM

It's All in the Clouds --- Cloud Computing and the Taxation of Digital Goods and Services

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Agenda

- Overview
- Characterization
- Sourcing
- Planning

Overview

Overview

- **Uncertainty of Tax Application**
  - The advent of the Internet and the availability of electronic items (e.g., downloadable software, music, movies, magazines, books, etc.) and the availability of electronic services (e.g., payroll processing, etc.) have eclipsed outdated sales and use tax laws, resulting in significant uncertainty on how to tax such products.
  - Over the last few years, states have eyed the burgeoning digital products and services market as a potentially lucrative source of revenue or as an increasing erosion of the tax base.

New Technology Models

- **Cloud Computing Services**
  - "Cloud computing is a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction." (National Institute of Standards and Technology)
- **Cloud Computing Benefits**
  - Cost savings and efficiency.
  - Businesses no longer need to expend their limited resources on purchasing and maintaining costly computer hardware and software.
  - Limits IT costs associated with managing computer hardware and software resources.
- **Cloud services market grew to $68.3 billion in revenue in 2010, a 16.6 % increase from 2009.**
- **The research firm Gartner, predicts that in 2014 cloud services revenue will balloon to $148.8 billion worldwide.**

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Application Service Providers ("ASPs")

- **An entity retains custody over (or "hosts") software for use by third parties.**
- **Users of the software hosted by the ASP typically will access the software via the Internet.**
- **The ASP may or may not own or license the software, but generally will own or maintain the hardware and networking equipment required for the user to access the software.**
- **The ASP may charge the user a license fee for the software (in instances where the ASP owns the software) and/or a fee for maintaining the software/hardware used by its customer.**

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Software as a Service ("SaaS")

- The *SaaS* model allows the consumer to use the provider's software applications running on a cloud infrastructure.
- The applications are accessible from various client devices through a client interface such as a web browser (e.g., web-based email).
- The consumer does not manage or control the underlying cloud infrastructure including network, servers, operating systems, storage, or application capabilities.
- Under the SaaS model a service agreement is almost always executed (vs. a software license agreement or services agreement for an ASP).
- SaaS model is familiar to most Internet users, and includes such offerings as web-based e-mail, calendars, word processing, and digital photo applications.

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Nature of the Issues

"Traditional" Software Transaction

- **Characterization:**
  - "Canned" = tangible personal property
  - "Custom" = service or tangible personal property
- **Consideration: Perpetual License Fee**
- **Delivery method: Tangible media or electronic delivery**
- **Intent of the customer: To obtain and use software that will reside on a customer's hardware – generally not scalable**

SaaS Transaction

- **Characterization: often unclear**
- **Consideration: Subscription Fee**

  (usage-based billing)
- **Delivery method: No delivery Access to remote services only**
- **Intent of the customer: To obtain scalable access to both computing hardware and software**

Platform as a Service ("PaaS")

- The PaaS model allows the consumer to run consumer-created or acquired applications on the cloud provider's platform.
- The consumer does not manage or control the underlying cloud infrastructure including network, servers, operating systems, or storage, but has control over the deployed applications and possibly the application hosting environment configurations.
- An example of an PaaS model includes web hosting and managed services.

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Infrastructure as a Service ("IaaS")

- The IaaS model provides the consumer with processing, storage, network capabilities, and other fundamental computing resources where the consumer is able to deploy and run software, which can include operating systems and applications.
- The consumer does not manage or control the underlying cloud infrastructure but has control over operating systems, storage, deployed applications, and possibly limited control of select networking components (e.g., host firewall).
- An example of an IaaS model includes co-location services.

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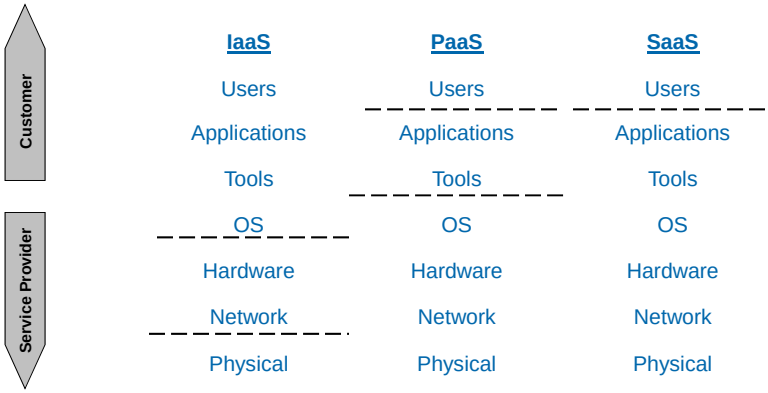
Cloud Service - Division of Ownership



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Digital Services

- **What are digital services?**
  - "[A]ny service that is provided electronically, including the provision of remote access to or use of a digital good." Digital Goods and Services Tax Fairness Act (S. 971/H.R. 1860).
  - "[A]ny service that is provided electronically, including the provision of remote access to or use of a digital good." RCW § 82.04.192(3)(a) (defining "digital automated services").

Digital Services

- **Digital services do not include:**
  - Telecommunications, audio or video programming
  - Advertising
  - Data processing
  - Digital goods
  - "Any service that primarily involves the application of human effort by the seller, and the human effort originated after the customer requested the service." RCW § 82.04.192(3)(b)(i).

Digital Goods: Examples

Conventional

- **Digital Books**
- **Digital Music**
- **Digital Audio-Video**

Non-Conventional

- **Legal Documents**
- **Medical Records**
- **Credit Reports**
- **GPS/Traffic Data**
- **Financial Data**
- **Weather Data**
- **Ring tones**
- **Screen Savers**
- **Transcripts**
- **Greeting Cards**
- **Maps**
- **Domain Names**

Characterization

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Characterization

- **What are you buying?**
  - Tangible personal property
  - Software
  - Service
  - Something else
- **What does the Agreement state you are buying?**
  - Auditors and courts heavily rely on the contractual language in characterizing the item being purchased. If a software license agreement is executed, it will be difficult to argue that you are not licensing software.

"Tangible Personal Property"

- **Most states tax sales of tangible personal property and enumerated services. Emerging trend to tax "digital goods".**
- **"'Tangible personal property' means personal property that can be seen, weighed, measured, felt, or touched, or that is *in any other manner perceptible to the senses*. 'Tangible personal property' includes electricity, water, gas, steam, and prewritten computer software." SSUTA, Appendix C.**

Service

- **The majority of states that impose a sales and use tax still only tax those services specifically enumerated as taxable. Determining if the sale is taxable can be a daunting task.**
  - Laws and interpretive guidelines are often outdated.
  - There is often a lack of clear guidance.
  - Categorization can have significant impact:
    - Reduced rates
    - Temporary imposition
    - Reduced tax bases
- **The Streamlined Sales Tax Project has, with some exceptions, avoided addressing service transactions. Some clarity developed for:**
  - Prewritten Computer Software (defined as TPP)
  - Digital Goods (addressed on following slides)
  - Bundled Transactions

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Characterization (cont'd)

- **Why does characterization matter . . .**
  - Determining taxability – states have different definitions
  - What use based exemption may be applicable
    - Resale, Manufacturing, R&D, etc.
  - Sourcing

Taxability of New Technology Models

- **With new technology models evolving, states are making every attempt to tax these new models under existing provisions.**
- **State taxing authorities continue to rely on letter rulings and informal administrative guidance to set forth their policy in regards to cloud computing services.**
- **Such rulings and notices provide limited guidance to the business community, and can also cause more uncertainty.**
  - For example, the Louisiana Department of Revenue recently repealed Revenue Information Bulletin 10-001, which addressed the issue of whether sales, use and/or lease tax is due upon the purchase or use of products, computer software and applications, or stored media and other materials electronically delivered into Louisiana, which are accessed from in-state or out-of-state vendors.
  - It is uncertain what the Department's current position is.
  - Such actions cause uncertainty for businesses, increase compliance costs as businesses re-examine their tax obligations, and inevitably compromises the ability of tax administrators to collect taxes effectively.

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Case Study

Software / ASP's

- Parent company licenses an enterprise wide license for use by all affiliates and un-related franchisees.
- Parent company purchases and installs the software on Parent company servers located in Tennessee.
- Affiliates and unrelated franchisees use the software from their locations, located nationwide. Parent company invoices both affiliates and unrelated franchisees for use of the software.
  - Is the sale of the initial software taxable to Parent Company?
  - Is the subsequent sales to the affiliates and franchisees taxable (consider TN, NY and PA).

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Case Study

Software or Service

- Seller hosts software which is uses in providing services to customers.
- Customer executes an "Application Service Provider Agreement."
- Customer uploads its information to Seller every day, which seller imports into its system.
- Customers can access the software to view their information, but only during the hours of 8am to 5pm EST.

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Impact on Planning and Compliance

- **Proactively assist in characterization of the sale**
  - Create tax categories according to intent of parties/language of contract
  - Consider bundling rules:
    - Unbundling – can components of the bundle be offered on a separate basis? Are books and records adequate?
    - If no books and records rule, is there a "true object"? Is one component subservient or *de minimis*?
    - Agree on uniform invoice language and create a tax practices document between the parties
- **Don't make characterization decisions in a vacuum; collaborate to the extent possible with other digital vendors**

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Sourcing

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Sourcing

- **Sourcing is dependent upon characterization. For interstate sales, if taxable as:**
  - Tangible Personal Property
    - Generally destination
    - Consider subsequent use
    - Consider concurrent use (prewritten computer software)
  - Services
    - Varies by state. May be:
      - Benefit
      - Performance
      - Consider multi-state benefit
  - Digital Goods
    - Not clearly defined. May be:
      - Destination
      - Benefit
      - Consider multi-state use

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Sourcing

- **Sourcing Under SST:**

(A)(1) When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.

(A)(2) When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to the purchaser (or donee), known to the seller.

(A)(3) When subsections (A)(1) and (A)(2) do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.

(A)(4) When subsections (A)(1), (A)(2), and (A)(3) do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.

(A)(5) When none of the previous rules of subsections (A)(1), (A)(2), (A)(3), or (A)(4) apply, including the circumstance in which the seller is without sufficient information to apply the previous rules, then the location will be determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold).

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Sourcing

- **SSTP Sourcing "Computer-Related Services"**
  - "Computer-Related Services" are undefined, and are sourced to where purchaser makes "first use."
  - Contains a "delivery" concept:
    - "Over-the-counter" sales are sourced to seller's business location.
    - Services performed at purchaser's location are sourced to that location.
    - Presumption in favor of purchaser's location, not the seller's:
      - Purchaser, with a single location in State A, accesses, but does not license, software located on Seller's server located in State B, which is characterized in both States A and B as a computer-related service. The Seller knows that the Purchaser makes first use of this service at its location in State A. Seller sources the transaction to State A.
- **Allocation is allowed when purchaser and seller agree on the allocation method.**

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Sourcing

- **What are the Problems?**
  - From a sales tax perspective, the concepts of destination and benefit are not easily applied to digital items. The Seller may have no idea where the receipt of the items takes place, or where the item is used.
  - From a purchaser perspective, location of use may not always be known – or may be from multiple locations.
    - Is "Use" at server location or user location? States vary, by way of example:
      - Pennsylvania – Server Location
      - New York – User Location
      - Trend towards user location, but be careful of states that include software or digital products in their definition of tangible personal property – these states may take a more traditional view of where these items should be sourced – one location.

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Sourcing - Multiple Points of Use

- **Multiple Points of Use ("MPU")**
  - The MPU provisions were repealed from the SST Agreement. Member states must repeal by January 1, 2008.
  - The MPU Exemption permitted a business purchaser of computer software, digital goods and services, which are concurrently used, to apportion, self assess, and remit use tax in all jurisdictions in which it will be used.
  - Generally, purchasers are allowed to use an apportionment method so long as its reasonable, consistent, uniform, and can be supported by their books and records.

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Sourcing - Multiple Points of Use

- **Colorado**
  - Colorado continues to sources software based on multiple points of use, and has issued Emergency Reg. 39-26-102.13 addressing this topic.
- **Massachusetts**
  - Massachusetts continues to source software based on multiple points of use – see Mass. TIR 05-15.
- **Washington**
  - Washington permits a purchaser of a digital product, service or software to issue an exemption certificate and accrue use tax based on location of use.

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Washington Exemption Certificate

Department of Revenue

Digital Products and Remote Access Software Exemption Certificate

This certificate allows the buyer to make tax exempt purchases using the exemptions checked below. This certificate cannot be used for purchases for personal use.

Exemptions claimed

Check all that apply *(see page 2 for exemption descriptions)*:

- ☐ Purchased to be made available free of charge to the general public. *(Only available for digital goods, digital automated services, digital codes, or remote access software).*
- ☐ Digital goods purchased solely for a business purpose. *(Only available for digital goods. Please see page 2 for more information).*
- ☐ Purchased for concurrent use by the buyer in and out of Washington State. Buyer must report use tax for in-state use. *(Only available for digital goods, digital automated services, digital codes, remote access software, or prewritten software)*

Purchases for resale or Purchases of Components

- ☐ Purchased digital goods, digital automated services, digital codes, prewritten software or remote access software to be resold in the regular course of business without intervening use. For purchases made after December 31, 2009, you must enter your reseller permit number: _____
- ☐ Purchased for use as a component of a new product for sale. *(Only available for digital goods, digital automated services, digital codes, or remote access software).* For purchases made after December 31, 2009, you must enter your reseller permit number: _____

Seller's Information

Business Name: _____

Buyer's Information

Business Name: _____ Tax Registration Number: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone Number: _____ Email Address: _____

Type of Business: _____

I certify that the purchase(s) I am making qualify as indicated above. I understand that misuse of this certificate will result in taxes due, interest, possible penalties, and including, if applicable, the 50 percent penalty of the tax due for misuse of the reseller permit. Misuse may also result in the reseller permit being revoked.

_____

Print name of person authorized by the buyer to sign the exemption certificate.

_____ _____

Signature of authorized buyer. *Date*

This certificate is valid for as long as the buyer and seller have at least one sales transaction within twelve consecutive months. RCW 82.08.050 (7) (c).

Reminder to Sellers: As of July 26, 2009, sellers of digital products or remote access software must file the state excise tax return electronically. Go to dor.wa.gov to file online.

Seller must keep a copy of this certificate. **Please do not send to the Department of Revenue.**

REV 27 0058e (5/5/10)

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Sourcing

- **Sourcing: Develop a Sensible and Uniform Approach**
  - State statutory and regulatory guidance often does not provide an answer/approach. Rather, a "range" of acceptable answers is the norm.
    - Washington
      - A business claiming this exemption must report and pay use tax on that portion of the digital products, digital code, prewritten software, or remote access software used in Washington. ***The taxable amount is determined by the number of users in this state compared to users everywhere.*** Generally, digital products and remote access software are used in Washington when the buyer first accesses, downloads, possesses, opens, stores, enjoys, or receives the benefit of the service in this state. A buyer may not claim a multiple points of use exemption for personal use.
  - Most auditors will look for a sensible approach that reflects a system of assigning sales to locations where the service is being "received."

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Sourcing

- **Sourcing: Develop a Sensible and Uniform Approach**
  - Yes, it's true: allocate, allocate, allocate!!
    - Services are often delivered simultaneously to several jurisdictions.
    - Consider
      - *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977;
      - *Goldberg v. Sweet*, 488 U.S. 252 (1989);
      - *Central Greyhound Lines, Inc. v. Mealy et al.*, 334 U.S. 653 (1948)
      - *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995)

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Legislative Trends

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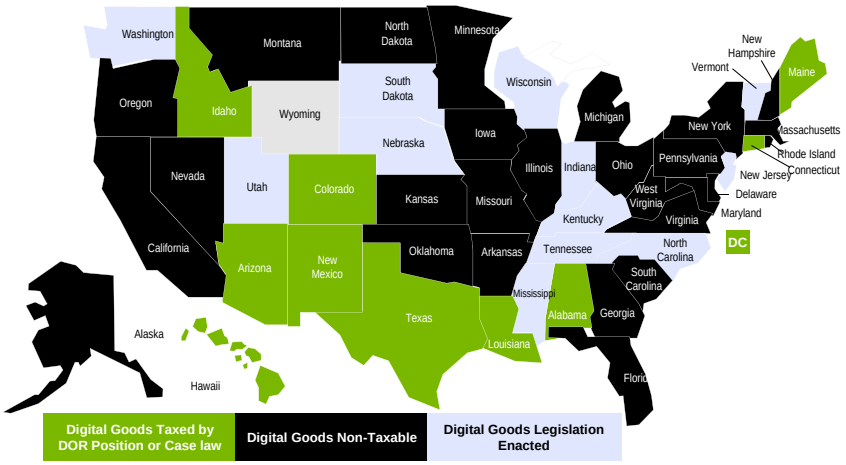
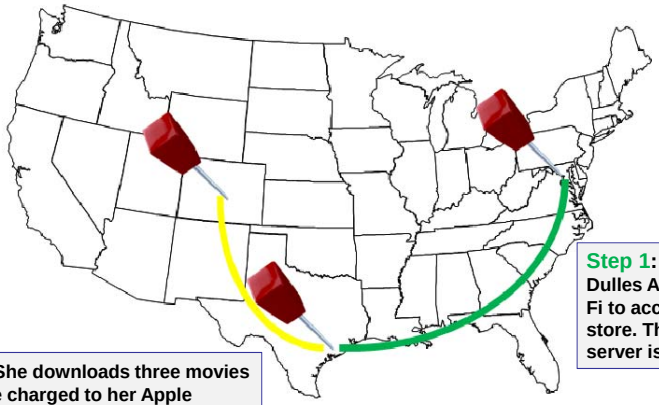
Taxing Digital Goods

Digital Products Taxability 2011



The Problem



Step 1: A Customer at Dulles Airport uses her Wi-Fi to access the Apple store. The Apple store server is located in TX.

Step 2: She downloads three movies which are charged to her Apple account – her billing address is in CO.

Which state has the right to tax?

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The Solution – Federal Legislation

- **Digital Goods and Services Tax Fairness Act of 2011 (HR 1860/S 971).**
- **A measure seeking to establish a national framework for the state & local taxation of digital goods and services (downloaded apps, cloud computing services, etc.).**

Federal Legislation

- **Why a national framework is needed -**
  - States and localities, desperate for new revenue sources, are already eyeing this expanding part of the economy as a source of new tax revenues, without first ensuring that digital goods and services will not be subject to multiple and discriminatory levels of taxation. Failure to establish a national framework will invariably lead to costly and wasteful litigation.
  - Congress has a clear role to act in tax matters impacting interstate and international commerce – digital commerce is sold over global networks crossing numerous state boundaries.

Federal Legislation

- **What the measure does –**
  - Ensures digital goods are taxed only once, precluding multiple states from claiming the right to tax same transaction or multiple taxation in the course of production
  - Ensures only generally applicable taxes can be imposed (i.e., general sales taxes) and that it must be done legislatively
  - Precludes discriminatory telecom/utility taxes from applying to digital commerce solely because these goods and services are riding over broadband/communication networks
  - Ensures that digital commerce is subject to same rules as comparable tangible goods.
  - Provides certainty in how segments of the new economy can be taxed for state & local tax purposes

Question to Ponder:

- **Does ITFA exempt certain digital services?**
  - In 2007, the definition of "internet access" under ITFA was expanded to include "a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and **personal** electronic storage capacity, that are provided independently or not packaged with Internet access." ITFA section 1105(5)(E).

Questions?

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18th ANNUAL PAUL J. HARTMAN SALT FORUM

IT'S ALL IN THE CLOUDS – CLOUD COMPUTNG AND THE TAXATION OF DIGITAL GOODS & SERVICES

MULTI-STATE SALES & USE TAX UPDATE

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ALABAMA

Information Services - The Alabama Department of Revenue has issued Revenue Ruling 2010-001 (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

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.

California Court Provides Sales Tax Guidance on Application of Technology Transfer Agreement Statutes to Software - In *Nortel Networks Inc., v. State Board of Equalization*, 119 Cal.Rptr.3d 905 (1/18/2011), the California Court of Appeals held that a manufacturer of telephone switching equipment (Nortel) was not subject to California sales tax on software that it licensed to operate switching equipment in California, under the state's Technology Transfer Agreement (TTA) statutes. The software licensed by Nortel was exempt under the TTA statutes because it (1) was copyrighted, (2) contained patented processes, and (3) enabled the licensee to copy the software, and to make and sell products—telephone calls—embodying the patents and copyright. The Court noted that the SBE's attempt to limit the scope of the TTA statutes by excluding prewritten computer programs in its implementing regulation was an invalid exercise of its regulatory power because the TTA statutes encompass "any" transfer of an interest subject to a patent or copyright, which included prewritten programs licensed by Nortel.

Canned Software - The California State Board of Equalization has issued News Release 66-11-H (5/27/11) reiterating that sales of off-the-shelf computer software are subject to tax and are not affected by the Court of Appeal's decision in the *Nortel* case, which held that a manufacturer of telephone switching equipment was not subject to California sales tax on software that it licensed to operate switching equipment in California. With the California Supreme Court denial of the SBE's petition for review of the Court of Appeal's decision on April 27, 2011, the SBE has amended regulation 1507 to reflect the Nortel decision.

Technology Transfer Agreements Regulation Amended - The State Board of Equalization (SBE) has revised Regulation 1507 (Cal. Code Regs. § 1507, Tit. 18), relating Technology Transfer Agreements (effective 6/22/2011), to reflect the Nortel decision (119 Cal Rptr 3d 905 (2011)) holding that a manufacturer of telephone switching equipment (Nortel) was not subject to California sales tax on software that it licensed to operate switching equipment in California, under the state's Technology Transfer Agreement (TTA) statutes. Specifically, the SBE deleted the last sentence from the second paragraph of Regulation 1507(a)(1), which was held invalid by the California Court of Appeal in Nortel.

COLORADO

Computer Regulation Repealed - The Governor of Colorado has signed into law HB 1192 (effective 3/1/2010), which 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.

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.

Canned or Standardized Software - Colorado House Bill 1293 (effective 07/01/2012) defines "tangible personal property" to exclude standardized software, effectively restoring a sales and use tax exemption that was previously repealed by HB 1192. Within the bill, computer software is included within the definition of "tangible personal property" and therefore subject to tax only if it is prepackaged for repeated sale or license; its use is governed by a tear-open nonnegotiable license agreement; and it is delivered to the customer in a tangible medium. Computer software is not delivered to the customer in a tangible medium if it is provided through an ASP, delivered electronically, or transferred via load and leave. Furthermore, the measure of Colorado sales tax due is the total of the license fees associated only with the licenses that are actually used in Colorado.

Authentication Services - The Colorado Department of Revenue has issued Private Letter Ruling PLR-11-003 (05/31/2011) holding that a taxpayer's sales of authentication services by means of a digital certificate are not subject to sales or use taxes because the "true object" of the transaction was the provision of a non-taxable service. The taxpayer provides authentication solutions for persons seeking to perform secure electronic commerce through by authenticating the identity of the customer, the related website and business, and the information presented by the customer during the registration process. Following the authentication process, the taxpayer electronically sends a digital certificate to its customer, to be authenticated when an end user connects to the customer's web server through a web browser. Since the true object was the provision of a non-taxable service, and not the digital certificate, the service is not taxable.

Computer Software - The Colorado Department of Revenue has issued FYI Tax Publication Sales 89 (7/1/2011) discussing the sales and use tax treatment of purchases of computer software, currently and in the future. From March 1, 2010 to June 30, 2012, standardized software is subject to state sales and use tax regardless of how the software is acquired by the purchaser. Maintenance agreements are typically not considered standardized software and are exempt from sales tax. Prewritten upgrades that are not specific to the user are taxable, even if included in the maintenance agreement. Mandatory maintenance agreements that are included in the price of standardized

software are subject to sales tax. Use tax may be apportioned for software that is available for use in multiple jurisdictions.

Effective July 1, 2012, computer software will be subject to sales or use tax if it meets all of the following criteria: (1) the software is prepackaged for repeated sale or license; (2) the use of the software is governed by a tear-open non-negotiable license agreement; and (3) the software is delivered to the customer in a tangible medium. Software is not delivered to the customer in a tangible medium if it is provided through an application service provider, delivered by electronic software delivery, or transferred by load and leave software delivery. Definitions are also provided within the Publication.

FLORIDA

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.

Software Delivered Electronically - The Florida Department of Revenue has issued Technical Assistance Advisement 11A-021 (07/23/2011) holding that a taxpayer's sale of software over the internet was not subject to Florida sales tax where the product was remotely installed directly to the customer's computer and there was no tangible aspect to this product such as a software CD or paper instruction manual. The taxpayer only has nexus with Florida because it offers on-site training for sale to its customers.

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.

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

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 (10/05/2010), ST-10-0103 GIL (10/29/2010) and ST-10-0077 GIL(8/23/2010) 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.

Digital Goods - The Illinois Department of Revenue issued General Information Letter ST 11-0035-GIL (5/3/2011), providing that the sale of electronic downloads of music or video from the Internet is not considered the sale of tangible personal property for purposes of the retailers' occupation tax and use tax. The Department notes that canned computer software is considered to be tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means, or other media. Computer software that is purchased via a download over the Internet, assuming it does not meet the specific requirements of licensed software, is taxable as a

retail sale in Illinois. The imposition of the various local sales taxes in Illinois takes effect when "selling" occurs in a jurisdiction imposing a tax. The local tax rate, if any, is fixed by the location where the sale takes place, not the delivery location. The fact that the item being sold is shipped from an out-of-state location or from another Illinois location is immaterial for purposes of the imposition of local taxes if the sale occurs in an Illinois jurisdiction imposing a local tax. For these transactions, the local tax imposed in the jurisdiction where the sale occurs will be incurred. If a sale occurs outside Illinois, but the property being sold is located in an inventory of the retailer which is located in an Illinois jurisdiction that has imposed a local tax, then the location of the property at the time of sale will determine where the seller is engaged in business for the purpose of determining the imposition of applicable local sales taxes. In situations in which both the sale and the location of the property being sold at the time of the sale are outside of Illinois, such sales would only be subject to the use tax at the rate of 6.25%.

Computer Software Maintenance Agreements - The Illinois Department of Revenue has issued General Information Letters ST 11-0041 and ST 11-0042 (5/26/2011) discussing computer software maintenance agreements. The taxability of maintenance agreements for the repair or maintenance of tangible personal property depends upon whether charges for the agreements are included in the selling price of the TPP. Where the charges are mandatory, the agreements are taxable; no tax is incurred on the maintenance services or parts when the repair is performed. If agreements are optional and separately stated, charges for the agreement are exempt. Computer software maintenance agreements that include TPP as patches or bug fixes will be taxed in accordance with the provisions discussed. Furthermore, charges strictly for updating canned software are fully taxable as sales of software, and not maintenance agreements.

Cloud-Based Streaming Video Services - The Illinois Department of Revenue has issued General Information Letter ST 11-0052-GIL (6/30/2011) discussing the effect of Illinois sales tax laws on sales of services, electronically transferred information, and access to information databases. At issue here is a company that hosts a cloud-based streaming video service for its customers. The Department offered general information, stating that if a company provides access to a database of information and does not transfer any software or other tangible personal property to its customers, the company would not incur Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax liability.

Electronically Delivered Data Guidance - The Illinois Department of Revenue has issued General Information Letter ST 11-0059-GIL (7/29/2011) which holds that a technology company that sells electronic access to data to out-of-state customers may not need to register to collect Illinois sales tax if no tangible personal property is transferred within Illinois. Information or data that is electronically downloaded is not considered the transfer of tangible personal property personal property in this State.

Computer Software Services - The Illinois Department of Revenue issued General Information Letter 11-0068-GIL (8/22/2011) explaining the sales tax treatment of various computer software services, including consultations, service calls, integration, and custom programming. The GIL gives a general overview of the tax treatment of computer software and associated services.

Optional Software Maintenance Agreements - The Illinois Department of Revenue issued General Information Letter 11-0070-GIL (8/24/2011) explaining the application of the retailers' occupation tax to separately sold computer software maintenance agreements. In general, maintenance agreements that cover computer software are treated the same as maintenance agreements for other types of tangible personal property. The taxability depends upon whether charges for the agreements are included in the selling price of the tangible personal property; thus, mandatory software maintenance agreements are taxable while optional agreements are exempt. Charges for updates of canned software are fully taxable as sales of software. Therefore, if a maintenance agreement provides for updates of canned software, and the charges for those updates are not separately stated and taxed from other maintenance agreement charges, then the whole agreement is taxable as a sale of canned software.

Delivery Charges - The Illinois Department of Revenue has issued General Information Letter 11-0071-GIL (8/29/2011) explaining that transportation or delivery charges paid by a seller in acquiring property for sale are merely costs of doing business to the seller and may not be deducted by seller in computing the ROT liability, even though the seller passes on such costs to its customers by separately stating the delivery charges from the sale of TPP.

INDIANA

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.

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.

Products Transferred Electronically - In order to remain in compliance with the SSUTA, the Indiana Department of Revenue has issued Indiana's Commissioner's Directive 41 (9/1/2011) relating to the taxability of products transferred electronically. Effective September 1, 2011, the Department may impose sales and use tax on products transferred electronically only if the products meet the definition of specified digital products, ancillary services, prewritten computer software, or telecommunication services. Before September 1, 2011, the Department imposed sales and use tax on products transferred electronically based on whether the products were taxable in their tangible forms. This directive does not have retroactive application.

IOWA

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

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.

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.

Software Licenses and Support Services - The Kansas Department of Revenue has issued Private Letter Ruling No. P-2011-002 (May 2, 2011) discussing the application of retailers' sales tax and compensating use tax to purchases of software licenses and support services. Kansas law imposes tax on the gross receipts from the sale of prewritten computer software, regardless of delivery method, and on the services of modifying, altering, updating, or maintaining prewritten computer software. In the present case, the taxpayer stated that the transactions did not involve licenses for prewritten software and no software was transferred, and therefore the purchases as described were not subject to tax.

Digital Video Game Sales - The Kansas Department of Revenue has issued Private Letter Ruling No. P-2011-004 (6/16/2011) holding that charges for codes to access video games residing on a third-party server are not taxable regardless of whether the sale takes place at a retail store or via the Internet. However, tax does apply to sales of access codes for video games which are downloaded to customers' computers, gaming consoles, or mobile devices regardless of how the sale occurs because retailers' sales tax applies to the sale of prewritten computer software, delivered tangibly or electronically.

KENTUCKY

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 (2/14/2011), 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.

Policy Statement Regarding Taxability of Remotely Accessed Software, Digital or Media Products Repealed - The Louisiana Department of Revenue has issued Revenue Information Bulletin No. 11-010 (5/23/2011) which repeals the implementation of a prior policy statement (Revenue Ruling No. 10-001), which pertained to the taxability of remotely accessed software, digital or media products, and other items of tangible personal property, and the sale, use or lease of software and program content. The Department's prior policy statement, Revenue Bulletin 10-011, stated that "[t]angible personal property includes, but is not limited to, all electronically delivered products, including computer software and applications, stored media, and entertainment media or products, to equipment located in Louisiana. Taxable transactions include, but are not limited to, remotely accessed software, information materials, and entertainment media or products, whether as a one-time use or through ongoing subscription, and whether capable of only being viewed, or being downloaded when that transfer requires payment of consideration in any form."

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.

Professional Photography - The Massachusetts Department of Revenue has issued DOR Directive 11-4 (8/9/2011) ruling that charges of a professional photographer are generally subject to Massachusetts sales tax where the final product is delivered to the purchaser in a tangible medium, regardless of whether those service charges are separately stated from the charge for the tangible item. Separately stated charges for services, such as "sitting fees", provided to a customer who is obligated to pay for those services but not obligated to purchase any tangible personal property as part of the transaction will not be subject to Massachusetts sales tax. In most instances, the purpose of hiring a professional photographer is to acquire tangible personal property such as photographs or a video. Therefore, all charges of a professional portrait or wedding photographer will be subject to Massachusetts sales tax if the final product is delivered to the purchaser in a tangible medium such as a wedding album, CD, DVD, finished portrait, etc. A photographer's transfers of pictures solely in a digital file via the Internet would not be subject to Massachusetts sales tax. Also, if the final tangible product is delivered to a purchaser outside Massachusetts or to an interstate carrier for delivery to a purchaser outside Massachusetts, the sale may be exempt from Massachusetts sales tax.

MINNESOTA

Qualified Data Center Exemption - The Minnesota Governor has signed into law an omnibus tax bill (HF 20) implementing a new sales and use tax exemption for qualified data centers. Purchases of enterprise information technology equipment and computer software for use in a qualified data center are exempt, effective for sales and purchases made after June 30, 2012, and before July 1, 2042. This exemption applies to enterprise information technology equipment and computer software purchased to replace or upgrade enterprise information technology equipment and computer software in a qualified data center. The tax on such exempt purchases must be imposed and collected and then refunded after June 30, 2013.

Ringtones Exempt - The Minnesota Governor has signed into law an omnibus tax bill (HF 20) implementing a new sales and use tax exemption for ringtones, effective after September 30, 2011, bringing Minnesota in conformity with the Streamlined Sales and Use Tax (SST) Agreement.

MISSOURI

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 (2/24/2011) 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.

Digital Photographs Not Taxable - The Missouri Department of Revenue has issued Letter Ruling 6676(3/29/2011) holding that charges for digital home photographs delivered to real estate agents via email are not taxable, as this transfer is not among the enumerated taxable services. Furthermore, charges for these services are not taxable so long as the pictures are downloaded to the customer's disc or USB drive as no TPP is transferred with the photographs.

Taxability of Software, Virtual Goods and Digital Content Discussed - The Missouri Department of Revenue has issued Letter Ruling 6866 (8/18/2011) discussing the taxability of remote access software, virtual goods and digital content. The Ruling held that access codes sold by a retailer to obtain remote access to software and virtual goods via the internet were not subject to sales tax because such sales are not among the enumerated services. Although the access code was printed on a physical receipt, the Department found that the true objection of the transaction was to obtain access to the remote software. The Department also held that the sale of downloadable digital content, however, was subject to sales tax if the purchase of the original program was subject to tax.

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.

Taxation of Electronic Mailing Lists Upheld - The taxation of electronic mailing lists has recently been upheld by the Streamlined Sales Tax (SST) Governing Board in *In the Matter of Substantial Compliance of the State of Nebrask*a (Decision No. 2011-1). The Business Advisory Council brought action before the Issues Resolution Committee SST

Governing Board seeking to find the State out of substantial compliance with the SST's rules. However, the Governing Board held that Nebraska was substantially compliant with the SST in taxing electronic mailing lists where the lists were deemed taxable pursuant to Nebraska regulations.

Information Guide on Computer Software and Services - The Nebraska Department of Revenue has released Information Guide 6-5-2011 (7/27/2011) discussing the taxability of computer software. Receipts from the transfer of computer software are taxable, no matter the method of delivery, as are related consulting services. Such services include coding, programming, and program development; software customization, testing, and upgrading; software planning and design; and systems analysis and diagnostics. In addition, service or maintenance contracts, software installation and delivery, access codes for specific video games and software training if the training is provided in Nebraska by the software retailer, are all taxable services. ASP's help desk support services, and website development and hosting services are non-taxable. However, website development is taxable if the website is transferred on a tangible storage medium to the customer.

Digital Goods - The Nebraska Department of Revenue has issued Revenue Ruling 01-11-3 (8/4/2011) stating that sales and use tax applies to sales of digital audio works, digital audio-visual works, digital books, and digital codes purchased by end users who receive the right to permanent use or less than a right of permanent use. The product must be received electronically and downloaded to a computer hard drive or electronic storage device. Sales and use tax also applies to sales of digital goods to end users where the right of use is conditioned upon continued payments. The sale of a digital code is taxable even when the purchaser may exercise the digital code to take electronic delivery of the digital product at a later date.

NEW JERSEY

SST Conformity Legislation - New Jersey has enacted SB 2130 (effective 4/8/2011), 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.

Sourcing of Prewritten Software - The New Jersey Division of Taxation has updated Technical Bulletin TB-51R (7/5/2011) discussing the application of sales and use tax to canned computer software to include sourcing provisions. The Bulletin discussing sourcing rules for the receipts from sales of prewritten software and services to prewritten software.

Digital Products - The New Jersey Division of Taxation has issued Publication ANJ-27 (7/1/2011), discussing the sales and use tax treatment of specified digital products and the receipts from installing, maintaining, servicing or repairing specified digital products. Products identified as specified digital products are also subject to tax when delivered in tangible form (i.e., CD, DVD, audio/video tape). The tax does not apply to other types of property that are delivered electronically, such as digital photographs, digital magazines, etc. but although a product delivered electronically may not be a specified digital product, tax may apply under other sections of the sales and use tax law. As to sourcing, specified digital products are subject to sales tax when the property is electronically delivered to the customer at an address in New Jersey. If the property is not received by the purchaser at the seller's New Jersey business location or at the purchaser's New Jersey location, the sale is subject to New Jersey sales tax if either the seller's business records or the address provided by the purchaser during the sale indicate a New Jersey billing address.

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.

No Nexus for Online Retailer - The New Mexico Taxation and Revenue Department has recently issued Decision and Order No. 11-10 (04/11/2011) in *In the Matter of the Protest of Barnesandnoble.com LLC* holding that the actions and activities of BarnesandNoble.com, an online bookseller, were not sufficient to constitute nexus in the State. The taxpayer, a Delaware LLC with all of its operations located outside of New Mexico, is an Internet-based retailer of books, music, and DVD/videos. All products sold by the taxpayer to New Mexico residents were delivered by the postal service or another common carrier. While the physical stores did allow returns of merchandise purchased from the taxpayer for in-store credit, they did not have dealings with the taxpayer regarding these returns. The hearing officer in the current audit based his decision on previous court hearings and found that the Department did not show that any of the taxpayer's activities were sufficient to establish substantial nexus.

NEW YORK

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 (11/16/2010) 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 (11/23/2010) 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 (11/24/2010) 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 (4//7/2011) 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.

Authentication Services Not Taxable - The New York Department of Taxation and Finance has issued Advisory Opinion TSB-A-11(14)S (5/3/2011) holding that a taxpayer's sales of its authentication service are not subject to sales and use taxes because no TPP or software is transferred nor is it among the enumerated taxable services. The taxpayer is a provider of authentication solutions for businesses seeking to perform secure electronic commerce and communications over the Internet, including the provision of a digital certificate and authentication services on a subscription basis. A digital certificate is provided online. The digital certificate itself is not software and does not contain code; any software used resides on the customer's server and the end-user's browser. Therefore, the taxpayer's service is not subject to tax.

Hosted Marketing Services Taxable - The New York Division of Taxation and Finance has issued TSB-A-11(17)S (6/1/2011) holding that a company's hosted marketing service that uses software to allow clients to create, manage and deliver email campaigns constitutes the sale of prewritten software, and its charge for that service is subject to New York sales and use tax. While the taxpayer does not separately charge for the use of the software, the Commissioner found that the set-up fee and the messaging charge constitute consideration for the right to use the software. By providing its clients with these rights to use or control its hosted product for a consideration, the taxpayer is making taxable sales of prewritten software. The situs of the taxpayer's sales is the location of the user of the software. Furthermore, the taxpayer's separate charges for optional computer software training and consulting-type services are not taxable.

E-Book Sales Not Taxable - The New York Department of Taxation and Finance has issued New York Advisory Opinion TSB-A-11(20)S (07/08/2011) holding that a taxpayer's sale of electronic books ("e-books") are not subject to sales tax because they are not tangible personal property and do not constitute information services. The taxpayer stores a digitized catalog of e-books, which are sold through its online bookstore. E-books are delivered electronically via the Internet to a customer's personal electronic devices and are not generally available for printing. The taxpayer's e-books are not taxable as tangible personal property because they are not tangible and do not include prewritten computer software. Moreover, because the e-books meet the definition of "e-books" in New York Technical Service Bureau Memorandum TSB-M-11(5)S (04/07/2011), the e-books are not taxable as information services under the Department's current policy.

Drawings Delivered Electronically Not Taxable - The New York Commissioner of Taxation and Finance has issued TSB-A-11(22)S (8/3/2011) holding that a draftsman's sales of patent drawings delivered electronically to his attorney customers are not subject to New York sales tax. Where drawings are delivered solely by electronic means, the receipts from their sales are not taxable.

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.

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.

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.

Computer Data Center Exemption - The Ohio Governor signed a budget bill (H.B.153) authorizing a partial or complete sales and use tax exemption for purchases of computer data center equipment and on the installation, delivery, and repair of such equipment, for a business that invests at least $100 million in the computer data center project site during a period of three consecutive years and maintains an annual payroll of at least $5 million at the center. A business must apply to the Tax Credit Authority to enter into an agreement for the complete or partial sales tax exemption.

Use Tax Amnesty - The Ohio Governor signed a budget bill (H.B.153) authorizing a use tax amnesty program for delinquent taxpayers who owe back use taxes for the period October 1, 2011 through May 1, 2013. Participating taxpayers will have 100% of the associated interest and penalties waived, and may set up a payment plan for up to seven years. The look-back period will be limited to only 2 years. In addition, even taxpayers currently under audit who have not yet received an assessment are eligible for the amnesty program. The Department has advised that more information will be available on its website soon.

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.

Help Supply Services - The Pennsylvania Department of Revenue has reissued Pennsylvania Sales and Use Tax Ruling SUT-06-014 (07/20/2011) holding that a taxpayer whose employees provided computer-related services to a customer based on the customer's specifications was rendering nontaxable computer programming and consulting services, rather than taxable help supply services. If the taxpayer were providing help supply services, its employees would have been under the customer's supervision, and the taxpayer's responsibility would have been limited to providing suitable employees. As the employees were under the taxpayer's control, and the taxpayer was responsible for delivering a work product meeting the customer's specifications, it was not engaged in providing help supply services.

RHODE ISLAND

Sales Tax to Apply to Software Delivered Electronically or by Load and Leave - With the passage of budget bill H.B. 5894, Rhode Island sales and use tax will apply to sales of

prewritten software delivered electronically or by load and leave, effective October 1, 2011.

Software Regulation Amended - The Rhode Island Division of Taxation has amended Sales and Use Tax Regulation SU 11-25, effective 10/1/2011, to reflect recent statutory changes. Under the new regulation, prewritten computer software, including application software, delivered electronically or by load-and-leave is taxable, including charges by the seller for any services (training, maintenance, consultation, etc.) necessary to complete the sale. Web hosting, however, remains exempt as the transaction is not considered prewritten computer software delivered electronically, provided that there is no downloading of prewritten computer software. Specified digital products are not considered prewritten computer software and are not subject to tax. Prewritten computer software maintenance agreements delivered electronically are taxable, regardless of whether the related software was purchased in tangible form or delivered electronically. The sale of technical support services only is not subject to tax. Regulation SU 11-25 amends and supersedes Regulation SU 09-25 promulgated on January 1, 2010.

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.

Warranties and Maintenance Contracts Exempt - S.B. 36, effective June 8, 2011, makes the sale or renewal of a warranty, service, or maintenance contract for tangible personal property, whether purchased alone or in conjunction with tangible personal property, exempt from sales and use tax beginning September 1, 2011.

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.

Drawings Delivered via Tangible Medium Taxable - The Tennessee Department of Revenue has issued Letter Ruling No. 11-15 (6/6/2011) holding that the sales of customized shop drawings are subject to Tennessee sales and use tax if the drawings are

transferred in a tangible medium. The sales price of the shop drawings is the fee charged for the entire project, including any charges for design services. The drawings are not subject to tax if they are transferred solely by electronic means because electronic transmission does not constitute a transfer of tangible personal property and the drawings are not considered digital products.

Website Services - The Tennessee Department of Revenue has issued Letter Ruling No. 11-22 (6/9/2011), holding that sales and use tax did not apply to a taxpayer's charges for customer referrals, website advertising space, customer tracking services, and website services where the taxpayer operated a website allowing customers to choose a vendor and access information about the vendor and the taxpayer received compensation from vendors for websites, advertising, and customer tracking and referrals. None of these services are among the enumerated services subject to the Tennessee sales and use tax. The websites provided to vendors did not constitute a taxable sale of software because title and possession of the software was never transferred to the vendors.

Canned Software & Mandatory Maintenance Agreements Taxable - The Tennessee Department of Revenue has issued Letter Ruling No. 11-30 (6/23/2011) holding that a company's purchase of computer software and mandatory maintenance agreement, which included customer support services and upgrades, were subject to sales and use tax because the prewritten computer software constitutes tangible personal property and the maintenance agreement was purchased along with the software sale.

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.

Web Hosting Provider Denied Resale Exemption - The Texas Comptroller of Public Accounts has issued Decision No. 100,478 (April 2011) holding that a Web hosting service provider's purchases of software licenses from Microsoft did not qualify for a resale exemption where the taxpayer did not subsequently transfer primary care over the software to customers as an integral part of its Web hosting services. To be entitled to the

resale exemption, the taxpayer had to show that it had transferred the care, custody, and control of the software to its customer. Although customers acquired primary custody and control over the software, the taxpayer failed to establish that it had transferred primary care over the software.

Internet Hosting Users Do Not Have Nexus - Texas House Bill 1841, effective 06/17/2011, provides that a person whose only activity in Texas is as a user of Internet hosting is not engaged in business in Texas. "Internet hosting" means providing internet access to an unrelated user using property that is owned or leased and managed by the provider and on which the user may store or process the user's own data or use software that is owned, licensed, or leased by the user or provider. Nexus is not established in Texas if this is the person's only state activity. In addition, an Internet hosting provider is not required to collect information about users' activities to determine their potential for tax liability.

Internet Hosting Services Nexus Clarified - The Texas Comptroller of Public Accounts has issued a Release (Tax Policy News, July 2011) explaining the purpose and effects of recently enacted H.B. 1841 which clarifies when purchasers of Internet hosting services are engaged in business in Texas for sales and use tax collection purposes. Specifically, the new legislation declares that no nexus is created when a purchaser's only contact with Texas is using Internet hosting services purchased from an unrelated third-party provider who provides those services by use of servers and software located in Texas. The Release explains that it is still Texas law that any person who owns or leases servers in Texas has nexus and must collect and remit tax on sales of taxable items. In addition, the bill did not change the taxability of Internet hosting services, which are still taxable under the definition of data processing.

UTAH

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.

Computer Software Rule Revised - The Utah State Tax Commission has amended Rule R865-19S-92 (effective June 23, 2011), regarding computer software and related transactions to reflect recent legislative changes to sourcing rules for software transactions. The revised rule provides guidance on the sourcing of computer software if the transaction does not include a copy of the software to the purchaser and the purchaser uses the software at more than one location. Further, the rule provides that sale of custom computer software constitutes a sale of a personal service and is exempt from sales and use tax, regardless of the method of delivery. Charges for services such as software maintenance, consultation in connection with a custom software sale, enhancements, or upgrading custom software are exempt.

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

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%.

Consulting Services Taxable - The Virginia Department of Taxation has issued P.D. 11-70 (May 11, 2011) holding that a consulting company's information technology solutions

and consulting services were subject to Virginia retail sales and use tax because the company failed to show that its services were sold directly to the federal government and to provide a valid resale exemption certificate.

Computer Software Delivered by Tangible Means Taxable - The Virginia Department of Taxation has issued P.D. 11-112 (June 20, 2011) ruling that purchases of computer software that were used in a taxpayer's business operations were subject to use tax because the facts did not support a conclusion that the sole method of delivery was by electronic means. The taxpayer contended that the software was downloaded and, therefore, not subject to use taxation. However, it appeared that some of the software, if not all of it, was furnished to the taxpayer by a vendor on a tangible medium, such as a CD or other software storage device. Just because the vendor declared that electronic delivery was its standard method of delivery did not sufficiently establish by itself that the only method of delivery was by electronic means. The documentation presented suggested that the computer software was delivered by both electronic and tangible means.

WASHINGTON

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.

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.

Digital Products - The Washington State Department of Revenue has issued Excise Tax Advisory 9001.2011 (6/30/2011) announcing that the initial phase of the taxation of digital products ended June 30, 2011 and normal enforcement practices will begin July 1, 2011. The Department noted that during the initial phase of implementation, if the taxpayer made a good faith effort to comply with the legislation, there were no adverse

consequences stemming from a lack of compliance. However, currently, the Department is moving to a process of normal enforcement in order to fully implement the new laws.

WISCONSIN

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.

Web Hosting - The Wisconsin Department of Revenue has issued a release titled "E-Mail Services Provided With Web Hosting" (7/7/2011) discussing the sales and use tax treatment of email services provided with Web hosting services. Web hosting services are not taxable in Wisconsin as they are not among the enumerated taxable services. A statute that imposes tax on services that consist of recording telecommunications messages and transmitting them to the purchaser of the service, or at that purchaser's direction, does not apply to email hosting services because email hosting services are incidental to the nontaxable Web hosting services.

Email Services Provided with Web Hosting - The Wisconsin Department of Revenue has issued Revenue Release No. 172-2 (7/1/2011) discussing the taxability of bundled web hosting service and a telecommunications message service (email services) for one price. In this scenario, the customer gets web hosting of their website on one server and if the customer chooses, they can receive one to 10 email accounts hosted on a separate server. The taxpayer does not provide the Internet access for the email, but does provide storage of email messages on a server and the ability for customers to send and receive email messages. Usage or non-usage of the one to 10 email accounts does not change the price of the web hosting fee, but if a customer uses more than 10 email accounts, the customer gets charged $1 for each email account over 10. The Department has determined that no part of the $25 hosting charge is subject to Wisconsin sales or use tax since web-hosting services are not among the enumerated taxable services under Wis. Stat. § 77.52(2)(a) . Moreover, the email accounts included in the $25 fee are likewise not taxable, since the sale of services that consist of recording telecommunications messages and transmitting them to the purchaser of the service or at that purchaser's direction that are incidental to another service that is not taxable and sold to the purchaser of the incidental service is not subject to tax. However, the additional charge of $1 for each email account over 10 represents a charge for a telecommunications message service sold separately from the web hosting services, and is subject to Wisconsin sales and use tax.

WYOMING

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.