Domestic and Multistate Updates

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Technical Corrections

Policy Statement on the Tax Regulatory Process

- Released by Treasury Dept on 3/5/19
- To explain and "reaffirm their commitment to a tax regulatory process that encourages public participation, fosters transparency, affords fair notice, and ensures adherence to the rule of law."
- Desire to follow APA even when not required for interpretive regulations.
- Limited use of temp regs
- Factors for issuing subregulatory guidance which while doesn't have force and effect of law that statute and regulations have, will be followed by the IRS.

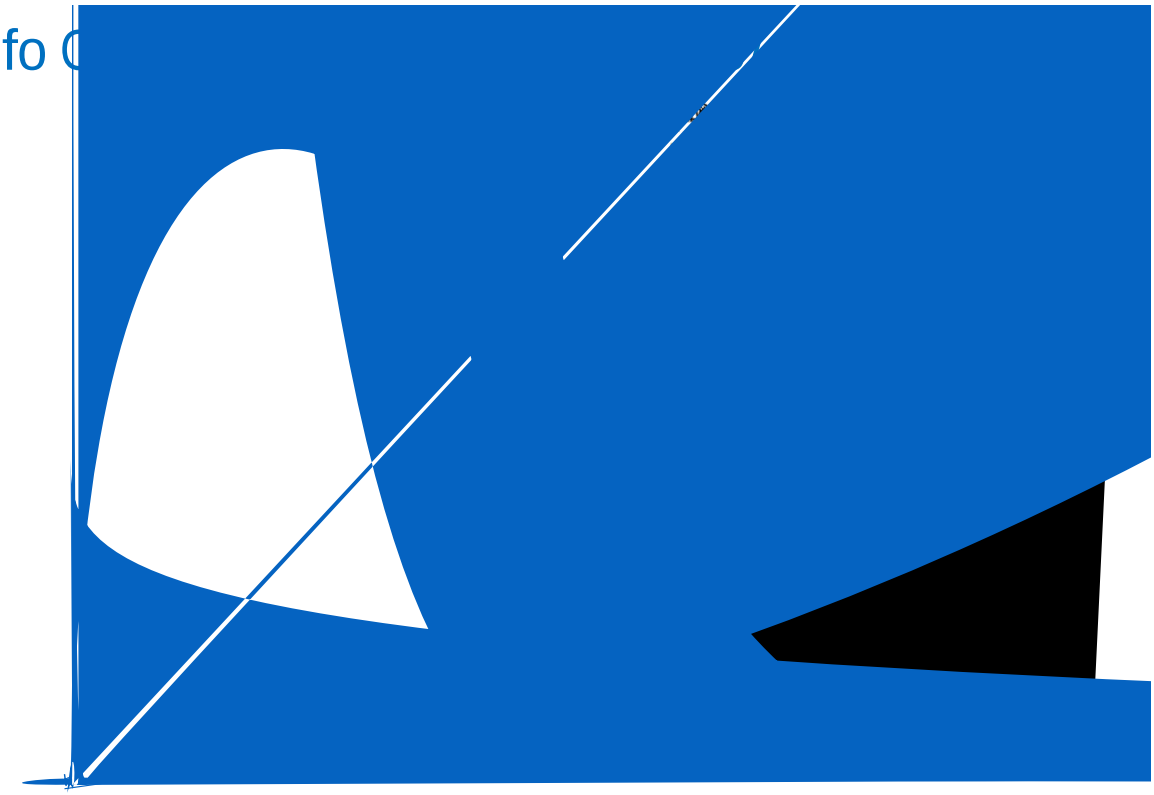
https://home.treasury.gov/system/fimu/131/P17.3(o)-2.84l

Notice 2019-58 (10/11/19) – IRS Allowing Taxpayers to Follow Prop §385 Regs When Temp Regs Expire 10/13/19

- Final and temp regs issued 10/21/16 – TD 9790
- §7805(e) requires that temp regs expire after 3 years and must also be issued as proposed regs
- 10/21/16 – also issued prop §385 regs – REG-130314-16
  - That reg states: "The text of the temporary regulations also serves as the text of these proposed regulations."
- Notice 2019-58 – "A taxpayer may rely on the 2016 Proposed Regulations for periods following the expiration of the Temporary Regulations until further notice is given, provided that the taxpayer consistently applies the rules in the 2016 Proposed Regulations in their entirety."
- *Query*: Is this the intent of 7805(e) added in 1988?

https://www.irs.gov/pub/irs-drop/n-19-58.pdf

More Info C

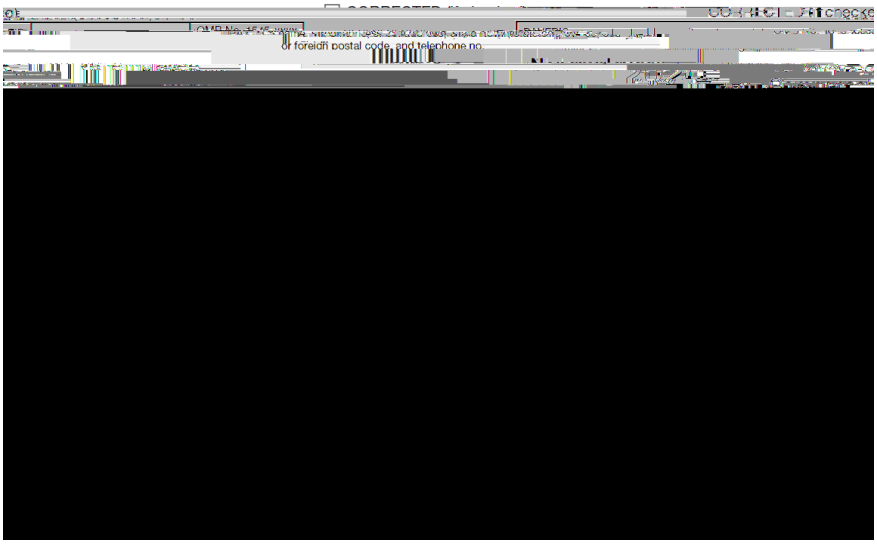


Final Regs on Truncating SSN on Form W-2

- TD 9861 (7/3/19) finalizes prop. regs (REG-105004-16 (9/20/17)) that modified regs under §§6051 and 6052 in response to Protecting Americans from Tax Hikes (PATH) Act of 2015, Public Law 114– 113 (12/18/15)
- Ok to truncate employee SSN on Form W-2 for forms required to be furnished after 12/31/20.
  - So, for 2020 Forms W-2
  - As with other truncating, is optional.
- Check if state conforms.

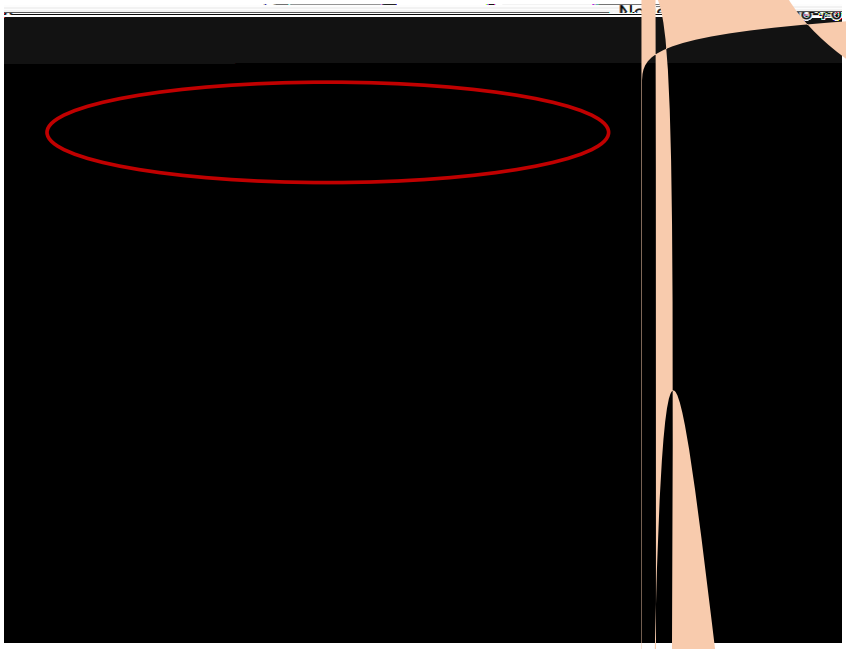
Draft Form 1099-NEC (7/24/19)

- Likely to address reality that today, Form 1099-MISC with box 7 is due 1/31 while balance is due 1/31



Client Meals Survive TCJA!

- Notice 2018-76 (10/3/18)
  - 50% deductible
  - Not considered entertainment
  -



Meals Rulings - TAM 201903017 (1/18/19)

- https://www.irs.gov/pub/irs-wd/201903017.pdf
  - **50 pages! But worth reading!**
- What is meal provided for convenience of employer?
  - IRS can't substitute its judgment for employers, but can determine if employees actually follow stated business policies and practices
    - IRS even noted that with meal delivery services today, how inconvenient can it be for employee to get a meal?
  - "Employers who provide specific business policies as substantial noncompensatory business reasons for furnishing meals to employees **must** be able to substantiate that such policies exist in substance not just in form by showing they are enforced on the specific employees for whom the employer claims these policies apply and must demonstrate how these policies relate to the furnishing of meals to employees."
  - IRS found that employer had "little factual support related to its claim that its employees could not safely obtain meals off business premises under usual circumstances."
    - And IRS considered availability of mobile meal delivery service.
  - Also found no policies related to employee health for the meals, or protection of intellectual property or safety.
    -

What about snacks in the breakroom all the time – de minimis?

IRS statements in CCA 200219005

- "The smaller in value and less frequently a particular benefit is provided, the more likely that such a benefit is properly characterized as a de minimis fringe benefit."
- "section 1.132-6(b)(2) provides that, where it would be administratively difficult to determine frequency with respect to individual employees, the frequency with which the employer provides similar fringe benefits is determined by reference to frequency with which the employer provides the fringe benefits to the workforce as a whole ("employer-measured frequency"). Therefore, under this rule, the frequency with which any individual employee receives such a fringe benefit is not relevant and in some circumstances, the de minimis fringe exclusion may apply with respect to a benefit even though a particular employee receives the benefit frequently."
- "The method chosen by the employer of accounting for benefits provided to employees is not determinative of whether accounting for the value of the benefits is administratively impracticable."

https://www.irs.gov/pub/irs-wd/0219005.pdf

What about snacks in the breakroom all the time? – more …

IRS statements in CCA 201903017

-

Notice 2018-99 (12/10/18)

Notice 2018-99 - "Total Parking Expenses" Includes:

- repairs,
- maintenance,
- utility costs,
- insurance,
- property taxes,
- interest,
- snow and ice removal,
- leaf removal,
- trash removal,
- cleaning
- landscape costs (if on or in the parking location)
- parking lot attendant expenses,
- security,
- **rent or lease payments or a portion of a rent or lease payment (if not broken out separately).**

Depreciation is not considered a parking expense.

Cost, not Value

"Although the value of a QTF is relevant in determining exclusion under §132(f) and whether the §274(e)(2) exception applies, the deduction disallowed under §274(a)(4) relates to the

Notice 2018-99 Reasonable method offered

- Parking area owned or leased by taxpayer: 1st determine % of spaces reserved for employees. Expenses attributed to this % of parking costs are not deductible by employer.
- For the balance of spaces, employer determines primary purpose (over 50% usage) – customers or employees. If over 50% for customers, then no other disallowed parking expenses. If primary purpose is employee parking, employer next allocates a portion of the costs of these spaces to

Research Credit Case – Is there 1984-1988 Data?

- *Quebe*, No. 3:15-cv-294 (SD OH 1/17/19)
  - S corp with 3 companies that design and develop electrical systems for large commercial buildings
  - Hired 3rd party to do research credit study for 2008-2011

Quebe - continued

- Court – Q has burden of proof that it did not have GR and QRE in base period
  - Testimony of 3rd party not sufficient as they had no knowledge of that time period.
  - "Government has the ultimate burden of proving its claim, which it may do by proving that Defendants have not substantiated their right to the claimed tax benefit."
- Observations:
  - So, should be able to use 1984-1988 period, but
    - Might not have sufficient data to do so.
    - Might result in no research credit
  - Should be able to use alternative simplified credit method.
  - Generally, IRS audits research credit claims on amended returns.

Defining Qualified Research

- *Siemer Milling Co.*, TC Memo. 2019-37 (4/15/19)
  - Mills and sells wheat flour since the 1950s.
  - Claimed research credit for 2011 and 2012 based on studies done in 2014 by its long-time CPA firm.
  - Two key employees helped: VP Production and CFO who had been with company for decades.
  - Some contemporaneous records existed, but not all were dated or stated who the author was
  - 9 projects for which credit was claimed
  - IRS denied saying many requirements for the credit were not met
  - IRS won – court agreed that all 9 failed "process of experimentation" requirement

https://ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=11930

Siemer Milling Co. – cont'd

- 4 requirements for qualified research (§41(d))
  1. meets §174 definition of R&E
  2. undertaken for the purpose of discovering information technological in nature,
  3. undertaken for the purpose of discovering information the application of which is intended to be useful in the development of a new or improved business component, and
  4. substantially all (at least 80%) of the activities of which constitute elements of process of experimentation

  Court disagreed with IRS interpretation of tests 1-3 but agreed with 4 and found that none of the 9 projects met #4.

1. §174

- "Siemer could have faced the same uncertainties for several years in a row; not all uncertainties are neatly resolved within the confines of a single taxable year. There is no requirement under the statute or

2. Technological in nature

- "Nothing requires a taxpayer to employ or contract with someone with a specialized degree to prove that research relied on the physical or biological sciences, engineering, or computer science. While the degrees held by those conducting the research for which a credit is claimed may be a factor in determining whether the technological information test is satisfied, no specific set of degrees is required." The court also declined "to apply an adverse inference" where the IRS had not called any of S's employees to testify. Also, court noted that measuring bacteria in flour involves field of biology.

3. Business component

"At trial Mr. Tegeler described the projects as "processes that we worked with * * * to develop products." This description is not at odds with Siemer's representation on brief that each of the projects is "either process improvements, product improvements, or some combination of both." While inconsistency in the record may weigh against a party's credibility, we find that this particular turn of phrase does not bar Siemer from meeting its burden with respect to the business component test on each of the projects presented at trial. Commissioner argues that because several of the projects spanned several years, the business components to which they relate were not new during the years in issue. We also find this argument unpersuasive. Like uncertainties under the section 174 test, the development or improvement of a business component can span more than one tax year."

4. Process of experimentation

"While Siemer states that it engaged in a process of experimentation, there is little in the record to support this assertion. Even the credit studies for the years in issue, which were admitted to the record subject to the Commissioner's hearsay objections, included very little evidence of Siemer's asserted process of experimentation. Had Siemer been able to rely on the credit studies for the truth of the matter asserted, that would not have been enough to establish that Siemer had engaged in a process of experimentation." …

4. Process of experimentation - more

Court applied this test to all 9 projects and all failed.

Example – Hydration project

- Did not state the steps of the process.
- Did not explain how the process was scientific.
- "We have insufficient evidence in the record to conclude that Siemer had a "methodical plan involving a series of trials to test a hypothesis, analyze the data, refine the hypothesis, and retest the hypothesis so that it constitutes experimentation in the scientific sense."

Siemer Milling Co. – cont'd

- No credit allowed.
- No penalty – reasonable cause as relied on competent tax adviser.

- *Observations*:
  - Why wasn't research credit addressed each year when there appears to be a variety of research activity at S?
  - If all that was missing was a process of experimentation, was that just not documented well enough?
  - Note how IRS seems to prefer seeing folks with titles and/or degrees in science and engineering fields.

California AB 5 Broadening Use of ABC Worker Classification Test Enacted

- Signed into law 9/18/19
- Effective 1/1/20
- Adopts the 2018 California Supreme Court classification approach in *Dynamex* beyond wage orders (rather than the longstanding *Borello* approach (common law / economic realities)).
  - To apply under the CA Labor Code, Unemployment Insurance Code, and wage orders of Industrial Welfare Commission
- Worker presumed to be employee unless "hiring entity demonstrates" A, B & C -------

ABC Classification Test

Worker is employee unless "hiring entity" shows A,B & C met:

A. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
B. The person performs work that is outside the usual course of the hiring entity's business.
C. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

AB 5 - more

- Several exceptions included.
- Generally, if exception applies, use the *Borello* factors (common law) rather than ABC.
- Read exceptions carefully
  - Wording and intent not always clear
  - Example: Enrolled Agents excepted, but several conditions must be satisfied for the exception to apply.
  - Check with labor law attorney for help with:
    - Is ABC test satisfied?
      - Yes – Contractor
      - No – See if an exception applies
        - No – Employee
        - Yes – likely requires application of *Borello* factors

Observations on the CPA and attorney exceptions

- The active license has to be from the State of California.
- What is “practicing?”
  - No reference to any law.
  - Is an active rather than inactive license enough?
    - Likely not because then why add “practicing”?
      - See California Business & Professions Code and case law

More on ABC from the *Dynamex* Case

- *Dynamex Operations West, Inc. v. Superior Court*

Part A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?

> "as under *Borello*, ... depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees, but does not possess over a genuine independent contractor. The hiring entity must establish that the worker is free of such control to satisfy part A of the test."

Observation: Seems if are a contractor under common law and Borello factors, meet A.

Part B: Does the worker perform work that is outside the usual course of the hiring entity's business?

"Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business. …

Accordingly, a hiring entity must establish that the worker performs work that is outside the usual course of its business in order to satisfy part B of the ABC test.[29]"

Observation: This is likely the challenging one for many employers and workers to meet both in fact and in interpretation.

For example, what exactly is the work of a textbook publishing company? Does that include authors and editors that produce content?

Footnote 29 on "B"

- *McPherson Timberlands v. Unemployment Ins. Comm'n* (Me. 1998) 714 A.2d 818 – worker hired to cut and harvest timber. Found to be in usual course of M's timber mgmt. company even though M did not own any harvesting equipment. Per court, the work was an integral part of M's business rather than merely incidental to it.
- *Great N. Constr., Inc. v. Dept. of Labor*, 161 A.3d at page 1215 – specialized historic restoration work done by worker was outside of usual course of general construction company's business. Worker needed special equipment and expertise that G did not have or usually need for most of its work.
- See footnote 29 for a few more cases, plus text of decision + other ABC decisions.

In contrast …

In 2018, 7 states enacted laws to treat platform workers (marketplace contractors) as independent contractors.

- Florida (HB 7087), Indiana (HB 1286), Iowa (SF 2257), Kentucky (HB 220), Tennessee (HB 1978), Utah (HB 364).
  - Example: https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=SF2257

Texas Workforce Commission similar in 2019

- https://www.sos.state.tx.us/texreg/archive/April262019/Ado

What is the best model?

- AB 5 states: "It is also the intent of the Legislature in enacting this act to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave. By codifying the California Supreme Court's landmark, unanimous Dynamex decision, this act restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law."
- Observations: Will AB address this?
  - Maybe
  - But many platform workers work < 10 hours per week and for only a few months.
    - Will an employer want to hire that person as an employee?
  - Will wages be greater than minimum wage? Will benefits beyond FUTA, minimum wage, overtime and FICA/HI be provided?
  - What about low paid employees including gov't employees who work part time and even with long unpaid breaks (for example, school crossing guards) – where are the laws to help these workers?

California AB 5 – To Do List For Any Employer with a California Contractor

- Read AB 5
- Determine if ABC test met
- If not met, see if any exception applies
- If worker no longer a contractor, determine what you plan to do after 2019 (keep person and reclassify as employee (and consider if want to exercise control over them and make them employee for federal purposes too), stop using that person's services, change your operations is enables meeting ABC test, something else?)
  - If employee for CA but contractor for federal, see if DE-4 works for figuring CA withholding. Watch for guidance from EDD and FTB.
    - https://www.edd.ca.gov/pdf_pub_ctr/de4.pdf
    - Also likely need EDD form for when *employee* hired:
      - DE 43 -

Wayfair and its Aftermath

South Dakota v. Wayfair

State Reactions to *Wayfair*

Adoption of South Dakota – Style Thresholds*

• **AL** – 10/1/2018 -- $250K plus an activity in Ala. Code § 40-23-68(b) • **AR** – 7/1/2019 • **AZ** – 9/30/2019 -- $100K[1] • **CA** – 4/1/2019 -- $500K • **CO**[2] – 6/1/2019 -- $100K • **CT** – 12/1/2018 -- $250K & 200 ($100K/200 beg. 7/1/2019) • **DC** – 1/1/2019 • **FL** – S.B. 1112** • **GA** – 1/1/2019 -- $250K/200 (collect or report); ($100K/200 beg. Jan. 1, 2020) • **HI** – 7/1/2018	• **ID** – 6/1/2019 -- $100K • **IL** – 10/1/2018 • **IN** – 10/1/2018 • **IA** – 1/1/2019; 7/1/2019 --$100K • **KS** – H.B. 2352/S.B. 22 -- $100K** • **KY** – 10/1/2018 • **LA** – 7/1/2020 • **MA** – 10/1/2017 -- $500K & 100 • **MD** – 10/1/18 • **ME** – 7/1/18 • **MI** – 10/1/2018 • **MN** – 10/1/2018 -- $100K in 10 transactions/100 transactions ($100K/100 beg. 10/1/2019)	• **MO** – S.B. 189/H.B. 701/H.B. 548** • **MS** – 9/1/2018 -- $250K plus systematic solicitation • **NC** – 11/1/2018 • **ND** – 10/1/2018; 1/1/2019 --$100K • **NE** – 1/1/2019 • **NJ** – 11/1/2018 • **NM** – 7/1/2019 -- $100K • **NV** – 10/1/2018 • **NY** – 6/21/2018 -- $500K & 100 • **OH** – 7/18/2019 • **OK** – 07/01/2018 -- $10K (collect/notice); 11/1/2019 -- $100K • **PA –** 4/1/2018 -- $10K (collect/notice); 07/1/2019 -- $100K	• **RI**[3] – 8/17/2017 • **SC** – 11/1/2018 -- $100,000 (includes marketplace sales) • **SD** – 11/1/2018 • **TN** - **SC- 05**[illegible]

Thresholds – Kansas

Kansas Notice 19-04 issued August 1, 2019 was supposed to take effect October 1, 2019, had no sales thresholds.

- Remote Sellers who are not already registered with the Kansas DOR must register and begin collecting and remitting sales and/or use tax by October 1, 2019.

Kansas Attorney General Schmidt on September 30, 2019 issued Opinion 2019 -8 which basically offered legal opinion nullifying Notice 19-04. AG's Synopsis noted that:

-

Thresholds – Kansas Cont.

-

Administration – (When to File)

- Colorado – The first day of the month after the ninetieth day the retailer made retail sales in the current calendar year that exceed $100,000.
- North Carolina – Sixty days after a remote seller meets the threshold.
- Texas – The first day of the fourth month after the month in which the seller exceeded the safe harbor threshold.

Wayfair Impact on Income Taxes

- Several states have adopted economic thresholds for corporate income tax purposes post-*Wayfair*
  - Oregon
    -

Marketplace Collection – The Next Frontier

Marketplace Collection – Pre-*Wayfair*

- Before *Wayfair*, states targeted marketplaces because they were unable to require remote sellers

Marketplace Collection – Post-*Wayfair*

- With the overturn of *Quill*, states are no longer restricted in pursuing remote sellers for sales tax collection.
- However, states have not slowed interest in requiring marketplaces to collect tax in lieu of remote sellers.
- The pace of marketplace legislation in 2019 has increased dramatically.
- States eye administrative ease of enforcing collection and remittance obligations on less entities.

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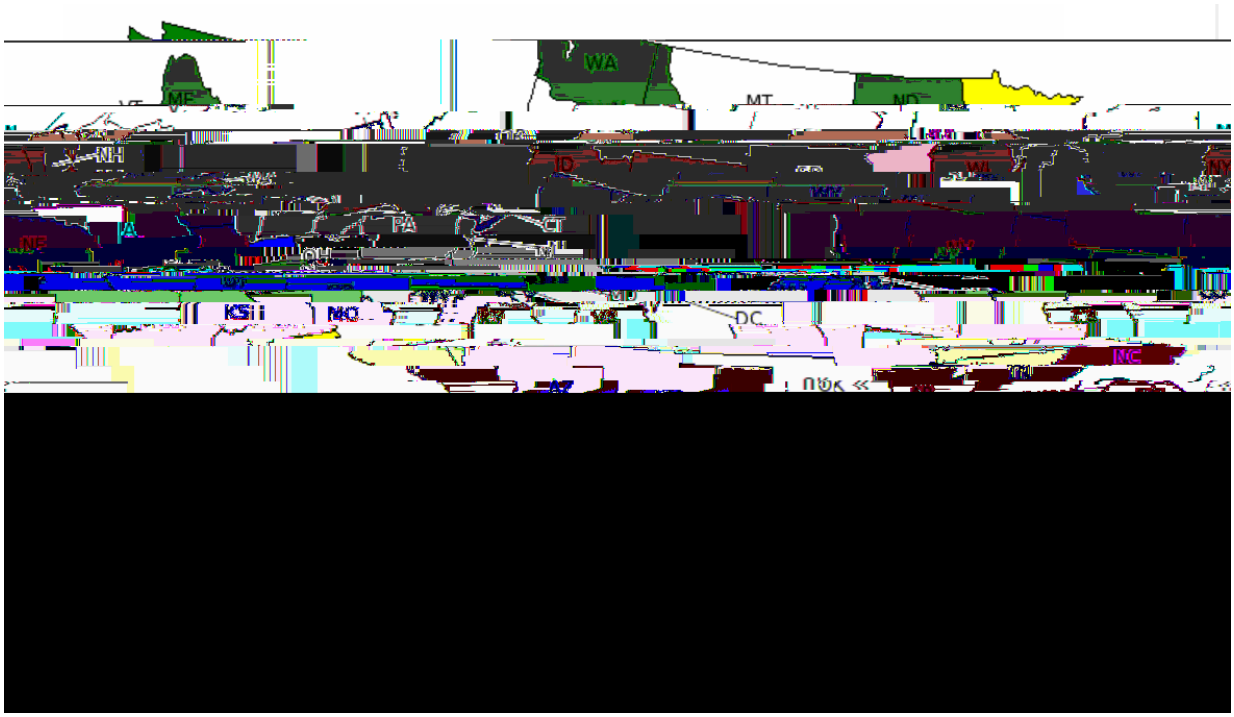
Marketplace Facilitator Laws



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Marketplace Collection – Post-*Wayfair*

- Marketplace collection laws generally contain the following provisions:
  - Require marketplaces to collect and remit sales tax on behalf of marketplace sellers.
  - Require marketplaces to report and remit sales tax collected on the marketplaces' sales tax return.
  - Audit of marketplaces for sales tax collected on marketplace seller sales.
  - Provide marketplaces some relief if the marketplace incorrectly determines taxability based on information provided by marketplace sellers.
  - Provide marketplaces some relief from liability – subject to certain annual caps – for failure to collect sales tax.
  - Limit class action lawsuits against marketplaces for over collection of sales tax.

Marketplace Collection Laws – Broad Definition (e.g. New Jersey)

- A "marketplace facilitator" is a person who facilitates taxable retail sales by satisfying both (1) and (2) (summarized below):

Marketplace Collection Laws – Narrow Definition (e.g. Pennsylvania)

- A "marketplace facilitator" is a person that "facilitates the sale at retail of tangible personal property. For purposes of this section, a person facilitates a sale at retail if the person or an affiliated person:
  1. lists or advertises tangible personal property for sale at retail in any forum; and
  2. either directly or indirectly through agreements or arrangements with third parties, collects the payment from the purchaser and transmits the payment to the person selling the property.

Marketplace Collection Laws – Additional Considerations

- A number of questions surround marketplace collection requirements:
  - Industry carve-outs
  - Waivers for in-state sellers?
  - Requirements limited to Sales & Use Tax?
  - Protections for sellers whose collection responsibilities have been ceded to marketplace facilitators?
  - Additional vendor compensation for marketplace facilitators?
  - Do *Wayfair* type thresholds apply to marketplace facilitators?
  - Do sales on a marketplace count towards the threshold?
  - Who is in the better position to collect and remit taxes?
  - What are the contractual realities between marketplace facilitators and third-party sellers?

Marketplace Facilitator Laws – MTC & NCSL Activity

MTC

New York – Marketplace Operators are Vendors

Advisory Opinion, TSB A 19(1)S (N.Y.S. Dep't of Taxation & Fin., Mar. 7, 2019, released Mar. 8, 2019)

- The New York Department of Taxation and Finance determined that an online marketplace operator that facilitates taxable software sales is a "vendor" liable to collect sales tax.
- The Department relied on a rarely-used portion of the definition of "vendor," which states that "when in the opinion of the commissioner it is necessary for the efficient administration of [the sales tax law] to treat any salesman, representative, peddler or canvasser as the agent of the vendor . . . the commissioner may, in his discretion, treat such agent as the vendor jointly responsible . . . for the collection and payment of the tax."

Louisiana – Online Marketplace Required to Collect

Delaware – Class Action on Food Delivery

Moore v. DoorDash, Inc., No. 1:19-cv-00636-UNA (D. Del. Apr. 5, 2019)

•

Little Rock – Lawsuit Against Uber Eats

Little Rock Advertising and Promotion Commission v. Portier LLC D/B/A Uber Eats, Dock. No. 60CV-19-1865 (Pulaski Cty. Cir. Ct.)

- On Mar. 19, 2019, the City of Little Rock Advertising and Promotion Commission filed a complaint against Uber Eats for failure to collect city tax on restaurant gross receipts.
- On May 13, 2019, Uber Eats filed a motion to dismiss, claiming that imposition of the tax on the marketplace results in double-taxation and that the DFA has held that platforms such as Uber Eats are operating as couriers and therefore not responsible for collecting the appropriate taxes.
- On July 18, 2019, the Pulaski County Circuit Court granted Uber Eats' motion to dismiss.

South Carolina – Amazon ALJ Ruling

Amazon Services LLC v. Department of Revenue, Dock. No. 17-ALJ

Digital Goods – Expanding the Tax Base

Consumer Digital Goods
Overview

- Sellers of retail consumer digital products, including music, movies, books, and software-related products like video games.

- Digital retailers sell products under various channels, terms, and conditions.
  - Delivery methods: streaming or cloud-based, downloads, or combination thereof
  - Rights of use transferred: permanent rights of use (purchases)or less than permanent (rentals)
  - Payment streams: A la carte (one-time) payment, subscription

- Limited store fronts, but may have brick-and-mortar affiliates.

- Content creators (e.g., movie studios) have begun selling direct-to-consumer.

Consumer Digital Goods
Sales Tax Issues

- **Characterization of Transaction**
  - "Products transferred electronically" or "specified digital products"
  - Tangible personal property
  - Taxable services
- **Tax Consequences of Characterization (or Mischaracterization)**
  - Bundled Transactions
  - Sourcing
  - Exemption Certificate Issues
  - Trials or "free samples" and use tax accrual
- **...and Non-Tax Consequences**
  - Communications service provider
  - False Claims Acts/Qui Tam
  - Class actions

Highlight on Washington
B&O Tax Surcharge Enacted

H.B. 2158 imposes a three-tiered surcharge to the B&O tax:

- 20% B&O surcharge on the income from 44 categories of services and activities, including, among others, financial services, insurance carriers, software services, online marketplaces, telecommunications services, electricity generators, and many others;
- 33.33% percent B&O surcharge on the service income of “advanced computing businesses” with gross revenue between $25 to $100 billion; and
- 66.67% B&O surcharge on advanced computing businesses with revenue of more than $100 billion.

Indirect Tax Case Developments - Software

Sales Taxation of Software – Manufacturing Exemption?

- ***Texas: Previous Pending Administrative Hearing Nos. 110,988 & 114,584***
  - Petitioner sells a massive online multiple player game.
  - The Hearings Division took the position that the taxpayer was selling amusement services and therefore could not qualify for the manufacturing exemption for software and equipment used to write the game under Texas Tax Code 151.318.
  - Hearings took this position even though software is defined under the Texas Tax code as being tangible personal property and had allowed other software manufacturers to qualify for the manufacturing exemption.
  - Case settled.

Sales Taxation of Software – Chicago

- ***Labell v. City of Chicago, 2019, IL App (1st) 181379***
  - On September 30, 2019, the Illinois Appellate Court upheld the City of Chicago's imposition of its amusement tax on streaming video, streaming audio and online gaming services.
  - A group of Chicago Streaming services customers sued asserted the amusement tax (1) exceed Chicago's home rule authority (2) violated the uniformity clause of the Illinois Constitution (3) violated the ITFA.
  - The court rejected all arguments the most interesting of which was the determination that ITFA and uniformity clause did not apply because it was not established that streaming services were different than live performances which were exempt.

Sales Taxation of Software – Utah

- **Utah Tax Commission, Private Letter Ruling 18-002 (April 10, 2019)**
    - The Utah Tax Commission issued a private letter ruling to a video streaming provider ("Taxpayer") finding that the Taxpayer's sales of subscriptions entitling subscribers to enhanced features on the Taxpayer's streaming platform, are not subject to sales and use tax.
    -

Sales Taxation of Software – Alabama

- ***Ex parte Russell County Community Hospital LLC v. Dep't of Revenue*** (Alabama May 2019) •
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Sales Taxation of Software – MPUs

- ***Oracle USA, Inc. et al. v. Commissioner of Revenue***, ATB Docket Nos. C318441, C318442, and C327798 (Massachusetts, Rule 33 Order dated May 25, 2019, reversing decision dated May 22, 2017)
  - Vendors sought sales tax refunds on behalf of Massachusetts-based customers who purchased software for use in multiple states.
  - In a 2017 decision, the Massachusetts Appellate Tax Board ("ATB") initially ruled in favor of the Commissioner, who argued that unless the seller obtains a Multiple Points of Use ("MPU") certificate on or before the date the sale is reported for sales tax purposes, no refund is available and sales tax is due on the entire purchase, regardless of where the software is used.
  - In 2019, the ATB issue an order on its own initiative reversing its earlier decision, and allowing the refund with respect to software used outside Massachusetts. The ATB noted that nothing in the statute or regulation bars taxpayers from establishing multiple points of use at a later date.

Texas Data Processing Update

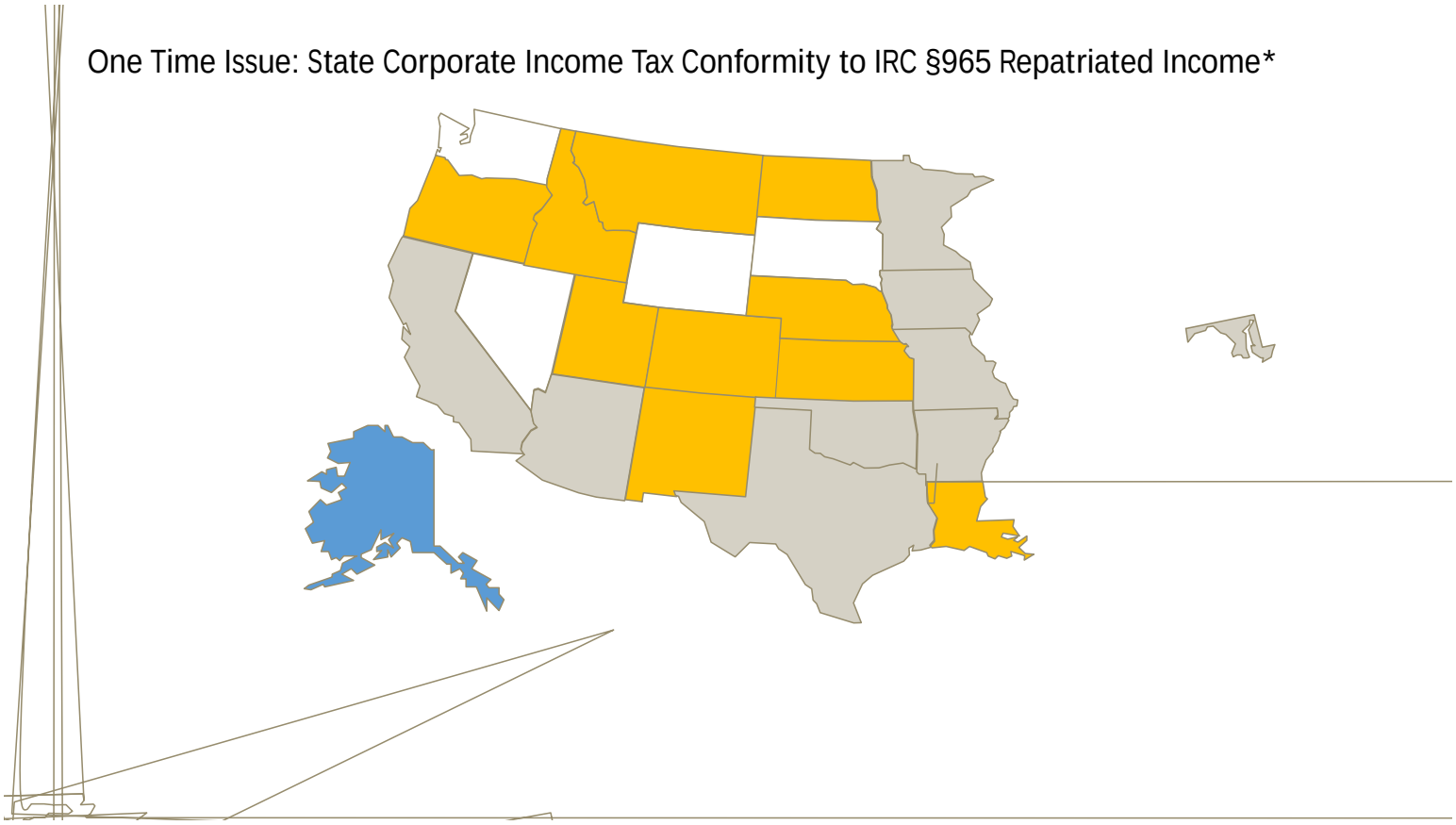
- Statutory definition of “data processing service” was enacted in 1987.
- ***Hegar v. CheckFree Services Corp***. – The taxpayer provided payment processing servi

Overview of State Tax Conformity with the Tax Cuts and Jobs Act

The Unintended Consequences of State Conformity with the Tax Cuts and Jobs Act (TCJA)

- **Potential Impact of the TCJA on Corporations:**
  - A federal corporate tax cut of about 10%.
  - A state corporate tax increase of about 12% (assuming conformity with TCJA based on pre-federal tax reform (FTR) linkage to IRC).
    - State Tax Research Institute (STRI) March 2018 study, "The Impact of Federal Tax Reform on State Corporate Income Taxes".
- The state outcome is **inadvertent and arbitrary**.
- **Biggest potential state corporate tax increases**
  - IRC §965 repatriation tax: generally 1 to 4 percent
  - GILTI (IRC §

One Time Issue: State Corporate Income Tax Conformity to IRC §965 Repatriated Income*



Foreign Derived Intangible Income (FDII): IRC §250

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Factor Representation and Constitutional Issues Relating to State Taxation of

Factor Representation: GILTI and IRC §965 Repatriated Income

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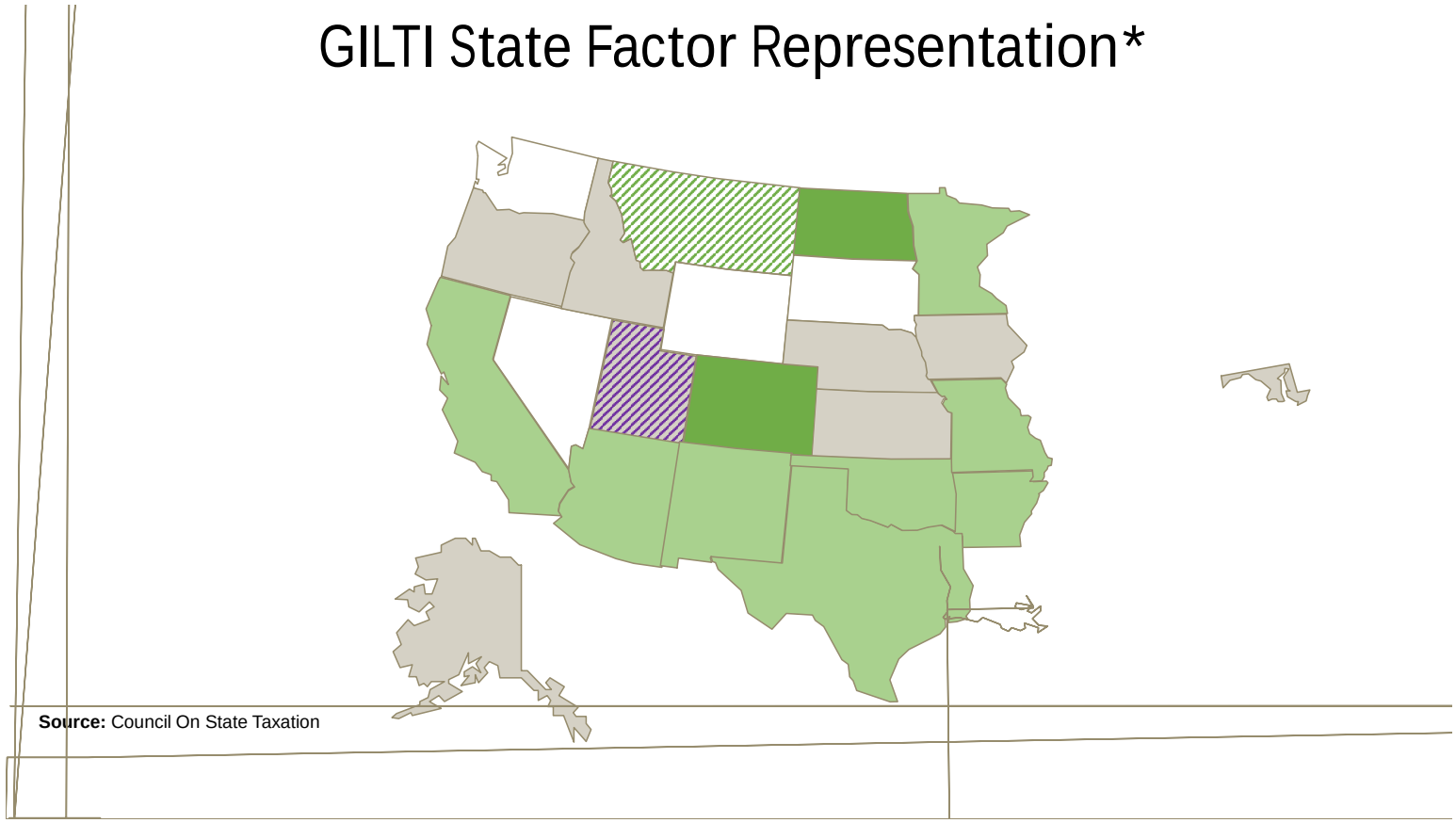
GILTI State Factor Representation*



Source: Council On State Taxation

State Conformity to 30% Interest Expense Limitation

Interest Expense Limitation – IRC § 163(j)

- **State Tax Issues:**
  - How is the limitation computed for state purposes when state and federal filing methodologies differ? **When will state guidance be issued?**
  - Will state allow indefinite carryforward of disallowed interest expense?
  - External vs. internal debt (especially for separate return jurisdictions).
  - How will the federal limits interact with state related party interest expense disallowance statutes?

- **Traps to Watch For:**
  - CFC Group Elections
  - Debt to Equity Characterization Rules
  - Forced Combination and §482 type Discretionary Powers

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Other State Tax Issues Related to the TCJA

- **100 Percent Expensing**
  - The TCJA allows 100 percent expensing for most capital investments for 5 years; however, most states decouple from this provision just as the states decoupled from bonus depreciation.

- **Alternative Minimum Tax**
  - Do AMT adjustments still need to be tracked for state purposes? What is the compliance cost?

- **Net Operating Loss Limitations and Carryforwards**
  - Numerous differences between Federal and State rules continue

- **State Conformity with the Deduction for Pass Through Entities**
  - Impact limited to a minority of states with PIT tied to federal "taxable income"

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Other State Tax Compliance and Planning Considerations

- **Elective state filing methodologies** may provide benefit (separate, consolidated, world-wide, waters-edge, etc.)
- Changes in **accounting methods** may create opportunities (timing of income recognition, etc.)

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