CHAPTER 299

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# TAXATION

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**HOUSE BILL 11-1293**

BY REPRESENTATIVE(S) Stephens and Murray, Balmer, Barker, Baumgardner, Becker, Beezley, Bradford, Brown, Conti, Coram, DelGrosso, Gardner B., Gerou, Holbert, Joshi, Kerr J., Liston, Looper, Massey, Nikkel, Priola, Ramirez, Sonnenberg, Summers, Szabo, Vaad, Vigil, Waller, McNulty, Schafer S., Swerdfeger;
also SENATOR(S) Jahn and Newell, Spence, Brophy, Cadman, Grantham, Harvey, King K., King S., Kopp, Lambert, Lundberg, Mitchell, Renfroe, Roberts, Scheffel.

# AN ACT

**CONCERNING THE REPEAL OF HOUSE BILL 10-1192 REGARDING THE STATE SALES AND USE TAX OF STANDARDIZED SOFTWARE ON JULY 1, 2012.**

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.   Repeal of regulations of the department of revenue.** (1)  Regulation 39-26-102.13, which rule was adopted January 19, 2011, is repealed, effective on the effective date of this section.

(2)   The office of legislative legal services shall forward a copy of House Bill 11-1293, enacted in 2011, to the secretary of state for purposes of informing the secretary of state of the general assembly's action repealing the rule specified in subsection (1) of this section.   The secretary of state shall delete Regulation 39-26-102.13 from the code of Colorado regulations and include appropriate references of such repeal in the code of Colorado regulations consistent with the provisions of section 24-4-103 (11), Colorado Revised Statutes.

**SECTION 2. Repeal.** 24-75-113 (3), Colorado Revised Statutes, is repealed as follows:

**24-75-113. 2010 bills to increase state revenue - prohibition on hiring of new state employees.** (3)  ~~No moneys derived from the increase in state revenues resulting from the passage of House Bill 10-1192, enacted in 2010, shall be appropriated for the purpose of funding additional full-time equivalent state employees.~~

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*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

**SECTION 3. Repeal.** 39-21-122 (4), Colorado Revised Statutes, is repealed as follows:

**39-21-122. Revenue impact of 2010 tax legislation - tracking by department.** (4)  ~~The department of revenue shall account for all revenue attributable to the enactment of House Bill 10-1192, enacted in 2010, and shall, to the extent such information is available, make quarterly reports to the general assembly regarding the quarterly and cumulative net revenue gain to the state resulting from the enactment of said bill.~~

**SECTION 4.** 39-26-102 (13.5) and (15), Colorado Revised Statutes, are amended to read:

**39-26-102. Definitions - repeal.** As used in this article, unless the context otherwise requires:

(13.5) ~~(a) (I) "Standardized software" means:~~

~~(A) Computer software, including prewritten upgrades, that is not designed or developed to the specifications of a specific purchaser; or~~

~~(B) Computer software designed and developed to the specifications of a specific purchaser but then sold to another purchaser.~~

~~(II) (A) "Standardized software" includes standardized software that is modified or enhanced even if such modification or enhancement is designed and developed to the specifications of a specific purchaser, unless such standardized software is a de minimis component of such software.~~

~~(B) "Standardized software" shall not include software or information technology services that modify or enhance standardized software if there is a reasonable, separately stated charge, invoice, or other statement of price given to the purchaser for such software or information technology services that modify or enhance the standardized software.~~

~~(C) Prior to January 1, 2011, it shall be sufficient if the reasonable, separately stated charge, invoice, or other statement of price referred to in sub-subparagraph (B) of this subparagraph (II) is separately identifiable based on the books and records of the vendor and need not be separately stated.~~

~~(III) "Standardized software" includes the combination of two or more standardized software programs or portions thereof.~~

~~(IV) "Standardized software" excludes maintenance agreements for the maintenance of standardized software.~~

~~(V) "Standardized software" shall not include software developed for a person's or affiliate's own use. However, if such software is subsequently sold, such software sold shall be considered standardized software.~~

~~(b) For purposes of this subsection (13.5), "computer software" or "software"~~

~~means a set of coded instructions designed to cause a computer or automatic data processing hardware to perform a task.~~

(15) (a) (I) "Tangible personal property" means corporeal personal property. The term shall not be construed to include newspapers, as legally defined by section 24-70-102, C.R.S., preprinted newspaper supplements that become attached to or inserted in and distributed with such newspapers, or direct mail advertising materials that are distributed in Colorado by any person engaged solely and exclusively in the business of providing cooperative direct mail advertising; except that, commencing March 1, 2010, for purposes of the state sales or use tax, "tangible personal property" shall include direct mail advertising materials that are distributed in Colorado by any person engaged solely and exclusively in the business of providing cooperative direct mail advertising.

(II) No funding received from revenues received as a result of the passage of House Bill 10-1189, enacted in 2010, shall be used to fund additional full-time equivalent state employees.

(b) ~~(I) "Tangible personal property" includes standardized software without regard to how such standardized software is acquired by the purchaser or downloaded to the purchaser's computer.~~

~~(II) The department of revenue may promulgate rules for apportioning tax in those instances in which standardized software is transferred for use in more than one state. Such rules shall be based only on those employees or users based permanently in the state.~~

(c) (I) "TANGIBLE PERSONAL PROPERTY", COMMENCING JULY 1, 2012, SHALL INCLUDE COMPUTER SOFTWARE IF THE COMPUTER SOFTWARE MEETS ALL OF THE FOLLOWING CRITERIA:

(A) THE COMPUTER SOFTWARE IS PREPACKAGED FOR REPEATED SALE OR LICENSE;

(B) THE USE OF THE COMPUTER SOFTWARE IS GOVERNED BY A TEAR-OPEN NONNEGOTIABLE LICENSE AGREEMENT; AND

(C) THE COMPUTER SOFTWARE 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 APPLICATION SERVICE PROVIDER, DELIVERED BY ELECTRONIC COMPUTER SOFTWARE DELIVERY, OR TRANSFERRED BY LOAD AND LEAVE COMPUTER SOFTWARE DELIVERY.

(II) AS USED IN THIS PARAGRAPH (c), UNLESS THE CONTEXT OTHERWISE REQUIRES:

(A) "APPLICATION SERVICE PROVIDER" OR "ASP" MEANS AN ENTITY THAT RETAINS CUSTODY OVER OR HOSTS COMPUTER SOFTWARE FOR USE BY THIRD PARTIES. USERS OF THE COMPUTER SOFTWARE HOSTED BY AN ASP TYPICALLY WILL ACCESS THE COMPUTER SOFTWARE VIA THE INTERNET. THE ASP MAY OR MAY NOT OWN OR LICENSE THE COMPUTER SOFTWARE, BUT GENERALLY WILL OWN AND MAINTAIN HARDWARE AND NETWORKING EQUIPMENT REQUIRED FOR THE USER TO

ACCESS THE COMPUTER SOFTWARE. WHERE THE ASP OWNS THE COMPUTER SOFTWARE, THE ASP MAY CHARGE THE USER A LICENSE FEE FOR THE COMPUTER SOFTWARE OR A FEE FOR MAINTAINING THE COMPUTER SOFTWARE OR HARDWARE USED BY ITS CUSTOMER.

(B) "COMPUTER SOFTWARE" MEANS A SET OF CODED INSTRUCTIONS DESIGNED TO CAUSE A COMPUTER OR AUTOMATIC DATA PROCESSING EQUIPMENT TO PERFORM A TASK.

(C) "ELECTRONIC COMPUTER SOFTWARE DELIVERY" MEANS COMPUTER SOFTWARE TRANSFERRED BY REMOTE TELECOMMUNICATIONS TO THE PURCHASER'S COMPUTER, WHERE THE PURCHASER DOES NOT OBTAIN POSSESSION OF ANY TANGIBLE MEDIUM IN THE TRANSACTION.

(D) "LOAD AND LEAVE COMPUTER SOFTWARE DELIVERY" MEANS DELIVERY OF COMPUTER SOFTWARE TO THE PURCHASER BY USE OF A TANGIBLE MEDIUM WHERE THE TITLE TO OR POSSESSION OF THE TANGIBLE MEDIUM IS NOT TRANSFERRED TO THE PURCHASER, AND WHERE THE COMPUTER SOFTWARE IS MANUALLY LOADED BY THE VENDOR, OR THE VENDOR'S REPRESENTATIVE, AT THE PURCHASER'S LOCATION.

(E) "PREPACKAGED FOR REPEATED SALE OR LICENSE" MEANS COMPUTER SOFTWARE THAT IS PREPACKAGED FOR REPEATED SALE OR LICENSE IN THE SAME FORM TO MULTIPLE USERS WITHOUT MODIFICATION, AND IS TYPICALLY SOLD IN A SHRINK-WRAPPED BOX.

(F) "TANGIBLE MEDIUM" MEANS A TAPE, DISK, COMPACT DISC, CARD, OR COMPARABLE PHYSICAL MEDIUM.

(G) "TEAR-OPEN NONNEGOTIABLE LICENSE AGREEMENT" MEANS A LICENSE AGREEMENT CONTAINED ON OR IN THE PACKAGE, WHICH BY ITS TERMS BECOMES EFFECTIVE UPON OPENING OF THE PACKAGE AND ACCEPTING THE LICENSING AGREEMENT. "TEAR-OPEN NONNEGOTIABLE LICENSE AGREEMENT" DOES NOT INCLUDE A WRITTEN LICENSE AGREEMENT OR CONTRACT SIGNED BY THE LICENSOR AND THE LICENSEE.

(III) THE INTERNALIZED INSTRUCTION CODE THAT CONTROLS THE BASIC OPERATIONS, SUCH AS ARITHMETIC AND LOGIC, OF THE COMPUTER CAUSING IT TO EXECUTE INSTRUCTIONS CONTAINED IN SYSTEM PROGRAMS IS AN INTEGRAL PART OF THE COMPUTER AND IS NOT NORMALLY ACCESSIBLE OR MODIFIABLE BY THE USER. SUCH INTERNALIZED INSTRUCTION CODE IS CONSIDERED PART OF THE HARDWARE AND CONSIDERED TANGIBLE PERSONAL PROPERTY THAT IS TAXABLE PURSUANT TO SECTION 39-26-104 (1) (a). THE FACT THAT THE VENDOR DOES OR DOES NOT CHARGE SEPARATELY FOR SUCH CODE IS IMMATERIAL.

(IV) IF A RETAILER SELLS COMPUTER SOFTWARE TO A COLORADO PURCHASER THAT IS CONSIDERED TANGIBLE PERSONAL PROPERTY TAXABLE PURSUANT TO SECTION 39-26-104 (1) (a) AND THE COLORADO PURCHASER PAYS THE RETAILER FOR A QUANTITY OF COMPUTER SOFTWARE LICENSES WITH THE INTENT TO DISTRIBUTE THE COMPUTER SOFTWARE TO ANY OF THE PURCHASER'S LOCATIONS OUTSIDE OF COLORADO, 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. THE COLORADO PURCHASER SHALL PROVIDE A WRITTEN STATEMENT TO THE RETAILER, ATTESTING TO THE AMOUNT OF THE LICENSE FEES ASSOCIATED WITH COLORADO AND WITH POINTS OUTSIDE OF COLORADO. THE WRITTEN STATEMENT SHALL RELIEVE THE RETAILER OF ANY LIABILITY ASSOCIATED WITH THE PRORATION.

**SECTION 5.** 39-26-709 (1) (c) (III), Colorado Revised Statutes, is amended to read:

**39-26-709. Machinery and machine tools.** (1) (c) As used in this subsection (1):

(III) "Manufacturing" means the operation of producing a new product, article, substance, or commodity ~~or producing standardized software as defined in section 39-26-102 (13.5) (a),~~ different from and having a distinctive name, character, or use from raw or prepared materials.

**SECTION 6. Effective date.** This act shall take effect July 1, 2012.

**SECTION 7. Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 7, 2011