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## Income/Franchise:

### **Kentucky Legislature Overrides Governor's Veto to Enact Numerous Tax Law Changes – Including Updated State Conformity to IRC, Tax Rate Revisions, Single-Sales Factor Apportionment, and Market-Based Sourcing Provisions**

*H.B. 366*, House and Senate override Governor's veto on 4/13/18. Effective immediately and applicable to taxable years beginning on or after January 1, 2018, recently enacted legislation generally updates statutory corporate and personal income tax references to the Internal Revenue Code (IRC) as in effect on December 31, 2017 (previously, December 31, 2015), exclusive of any amendments made subsequent to that date, other than amendments that extend provisions in effect on December 31, 2017 that would otherwise terminate [Note: see *State Tax Matters*, Issue 2018-3, for the Kentucky Department of Revenue's release from earlier this year that discusses how the federal 2017 Tax Reform Act may affect Kentucky income taxation]. Under this new law, Kentucky continues to decouple from certain federal income tax provisions including those involving the IRC Sec. 179 deduction and bonus depreciation. Applicable for taxable years beginning on or after January 1, 2018, the new law additionally:

URL: <http://www.lrc.ky.gov/record/18RS/HB366.htm>

URL: [http://newsletters.usdbriefs.com/2018/Tax/STM/180119\\_3.html](http://newsletters.usdbriefs.com/2018/Tax/STM/180119_3.html)

- Replaces Kentucky's current graduated corporate and personal income tax rate structures with a flat 5% tax rate for corporations and individuals;
- Adopts a single-sales factor (*i.e.*, single receipts factor) apportionment formula for apportioning a corporation's business income to Kentucky in place of the current three factor, double-weighted sales apportionment formula, as well as provides special apportionment provisions for various industries;
- Implements market-based sourcing rules for assigning receipts from certain services and intangibles to Kentucky, including a "throwout" rule; and
- Excludes from the single receipts factor certain income derived from treasury transactions (*e.g.*, from hedging and securities transactions).

The new law includes a number of tax administration changes, such as i) generally extending the deadline for filing with the Kentucky Department of Revenue final federal tax audit changes from *30 days* to *90 days* after the federal audit's conclusion, and ii) prohibiting certain contingent fee audit arrangements.

For Kentucky sales and use tax purposes, this new law requires certain out-of-state remote sellers meeting specified "economic nexus" statutory criteria to collect and remit Kentucky sales tax on their sales to in-state customers; see below (within the "Indirect/Sales/Use" section) for more details on these and other Kentucky sales and use tax provisions included in this bill.

Stay tuned for a forthcoming Multistate Tax Alert for more details on this legislation, and please contact us with any questions.

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## Income/Franchise:

### **New Mexico Administrative Hearings Office Holds that Taxation of Dividends and Subpart F Income from Foreign Affiliates is Constitutional**

*D&O No. 18-12*, N.M. Tax. & Rev. Dept. (4/6/18). The Administrative Hearings Office (AHO) within the New Mexico Taxation and Revenue Department (Department) recently held that the Department's state corporate income tax assessment against a multinational diversified technology and financial services company filing New Mexico consolidated returns for the tax years at issue did *not* discriminate against foreign commerce under the US Constitution's Commerce Clause – thereby rejecting the taxpayer's argument that the underlying assessment

unconstitutionally taxed the dividends and Subpart F income received by its foreign affiliates while “treating domestic dividends more favorably by excluding them from the base income of the consolidated group.” In doing so, the AHO determined that the Department’s methods used during the audit to determine base income for the consolidated group did *not* violate the Foreign Commerce Clause. However, the AHO did agree to abate the underlying imposed penalties as the taxpayer was able to show that it had made a mistake of law, in good faith and on reasonable grounds. Please contact us with any questions.

[URL: http://realfile.tax.newmexico.gov/18-12\\_General%20Electic%20Company%20%20Subsidiaries.pdf](http://realfile.tax.newmexico.gov/18-12_General%20Electic%20Company%20%20Subsidiaries.pdf)

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## Income/Franchise:

### New York: Department of Taxation and Finance Issues Notice on State Treatment of IRC Sec. 965 Repatriation Income for Individuals for Tax Year 2017

*Notice No. N-18-4: New York's Treatment of IRC § 965 Repatriation Income for Individuals for Tax Year 2017*, N.Y. Dept. of Tax. & Fin. (April 2018). The New York Department of Taxation and Finance (Department) has issued a notice on the federal 2017 Tax Reform Act (*i.e.*, P.L. 115-97), specifically the state income tax impact for individuals for tax year 2017 regarding the mandatory deemed repatriation income under Internal Revenue Code (IRC) Sec. 965. The notice states that, for individuals, the net IRC Sec. 965 amount is required to be included in federal adjusted gross income (FAGI), and consequently, New York taxable income – and that there is no New York exemption or deduction for this income for individuals (including S corporation shareholders). Unlike the federal law, which allows taxpayers to elect to pay the tax liability from the IRC Sec. 965 amount over eight years or, in the case of S corporation shareholders, defer the tax liability until specified triggering events happen in the future, the notice explains that New York individual taxpayers must pay the additional New York tax generated by the IRC Sec. 965 amount in the tax year it is recognized and included in FAGI.

[URL: https://www.tax.ny.gov/pdf/notices/n18\\_4.pdf](https://www.tax.ny.gov/pdf/notices/n18_4.pdf)

The notice additionally explains that this inclusion of the IRC Sec. 965 amount in New York taxable income may result in a substantial increase in the 2017 New York tax liability of individuals. To this end, the notice states:

“The Department has determined that the enactment of Public Law 115-97 so late in the 2017 taxable year constitutes reasonable cause for taxpayers to underpay the portion of their tax liability attributable to IRC § 965 by the due date for the 2017 New York personal income tax returns. If the taxpayer receives a bill for the underpaid tax that includes a late payment penalty, the taxpayer may request a waiver of the late payment penalty and must supply the Department with a copy of the *IRC 965 Transition Tax Statement* as part of its request.”

The notice explains that if the taxpayer provides such information and pays the remaining tax and applicable interest due, or enters into an installment payment agreement to pay the remaining tax and applicable interest due, “the Department may waive the late payment penalty.” Please contact us with any questions.

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## Income/Franchise:

### Oregon DOR Provides Individual Income Tax Guidance on State Treatment of IRC Sec. 965 Repatriation Income for Tax Year 2017

*Revenews*, Or. Dept. of Rev. (4/12/18). Pursuant to recently issued federal guidance, as well as enacted Oregon legislation [S.B. 1529; see *State Tax Matters*, Issue 2018-15, as well as forthcoming Multistate Tax Alert for more details on this new Oregon law] that updates several of Oregon's tax law references to the Internal Revenue Code (IRC) as in effect on December 31, 2017, and addresses certain provisions of the federal 2017 Tax Reform Act (*i.e.*, P.L. 115-97) including the mandatory deemed repatriation income under IRC Sec. 965, the Oregon Department of Revenue (Department) has issued some guidance for Oregon personal income taxpayers who must report their IRC Sec. 965 repatriated deferred foreign income on their 2017 federal tax returns. This administrative guidance generally explains that, for Oregon personal income tax purposes, deducting income that is taxable by Oregon in order to take advantage of a special federal tax rate is *not* allowed, and that an addition on the Oregon return is required for the amount that was deducted under IRC Sec. 965(c) from the repatriation income to arrive at the amount included on "Line 21" of the federal return. To this end, the Department states, "Please use addition code 162 (titled "Capital loss with Oregon-only tax benefit" even though the description does not match the use) to add the deduction amount (IRC 965 (c)) to your 2017 Oregon personal income tax return." With respect to the Internal Revenue Service allowing the underlying taxes on the repatriated and deferred income to be paid over eight-years, the guidance explains that Oregon is not tied to this extension of time for making payments and, therefore, Oregon taxes to be paid on this income are due by April 17, 2018. Please contact us with any questions.

URL: <http://listsmart.osl.state.or.us/pipermail/revenews/attachments/20180319/fc22f946/attachment-0001.html>

URL: <https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/SB1529>

URL: [http://newsletters.usdbriefs.com/2018/Tax/STM/180413\\_5.html](http://newsletters.usdbriefs.com/2018/Tax/STM/180413_5.html)

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## Income/Franchise:

### Oregon Supreme Court Affirms Tax Court Decision Disallowing "Compact" Apportionment Election

*Case No. S063625*, Or. (4/12/18). The Oregon Supreme Court (Court) has affirmed the Oregon Tax Court's 2015 decision [see previously issued Multistate Tax Alert for more details on the Oregon Tax Court's 2015 ruling in this case], which had held that when the Oregon Legislature enacted Or. Rev. Stat. § 314.606 in 1993, the Legislature "effectively disabled" the ability of taxpayers to make an election under the Multistate Tax Compact (Compact) to use the equally weighted, three-factor (sales, property, and payroll) apportionment formula. The Court also agreed that the enactment of Or. Rev. Stat. § 314.606 did *not* violate any procedural or substantive provision of the Oregon Constitution, and did *not* violate the federal Compact Clause or the federal Contract Clause of the US Constitution. Accordingly, in this case, a federal affiliated group (the taxpayer) could not elect to compute its Oregon corporate income tax liability for the 2005 through 2007 tax years pursuant to the Compact's equally weighted, three-factor apportionment formula. As such, the taxpayer at issue was required to use Oregon's single-sales factor apportionment formula as provided in Or. Rev. Stat. § 314.650. Please contact us with any questions.

URL: <http://cdm17027.contentdm.oclc.org/cdm/compoundobject/collection/p17027coll3/id/5997>

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-oregon-tax-court-disallows-compact-apportionment-election.html?id=us:2em:3na:stm:awa:tax:042018>

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## Income/Franchise:

### Tennessee: New Law Permits Financial Asset Management Companies to Elect Single-Sales Factor Apportionment

*S.B. 2256 [Pub. Ch. 656]* signed by gov. 4/9/18. Effective immediately and applicable for tax years beginning on or after January 1, 2018, new law permits certain defined publicly traded “financial asset management companies” to elect to apportion their net earnings and net worth for state franchise and excise tax purposes using a single sales factor (*i.e.*, single receipts factor) apportionment formula. Once such an election is made, it remains irrevocably in effect for five tax years. Please contact us with any questions.

**URL:** <http://publications.tnsosfiles.com/acts/110/pub/pc0656.pdf>

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## Income/Franchise:

### Virginia: New Law Requires Certain “Debt Buyers” to Use Single-Sales Factor Apportionment

*H.B. 798 [Ch. 807]* signed by gov. 4/9/18. Effective July 1, 2018 and applicable for tax years beginning on or after January 1, 2019, new law requires certain defined “debt buyers” to apportion their qualifying income from debt collection to Virginia for state corporate income tax purposes based on single-sales factor apportionment. For sales factor sourcing purposes, such debt buyers generally must source their qualifying sales from non-tangible personal property to Virginia if they consist of money recovered on debt that a debt buyer collected from either a Virginia resident, *or* an entity that has its commercial domicile in Virginia. The new law generally defines a “debt buyer” for purposes of these provisions as an entity and its affiliated entities that purchase nonperforming loans from unaffiliated commercial entities that: i) are in default for at least 120 days; or ii) are in bankruptcy proceedings. The term “debt buyer” generally does *not* include an entity that provides debt collection services for unaffiliated entities. Please contact us with any questions.

**URL:** <http://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB798>

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## Indirect/Sales/Use:

### Kentucky Legislature Overrides Governor’s Veto to Enact Numerous Tax Law Changes – Including Remote Seller “Economic Nexus” Provisions and Expanded Tax Base

*H.B. 366*, House and Senate override Governor’s veto on 4/13/18. Generally applicable to transactions occurring on or after July 1, 2018, new law requires certain out-of-state remote retailers meeting specified “economic nexus” statutory criteria (*i.e.*, having in-state sales of more than \$100,000, or at least 200 separate in-state transactions, in the previous or current calendar year) to collect and remit Kentucky sales tax on their sales (including sales of digital

property delivered or transferred electronically) to in-state customers. The new law specifically excludes certain defined “marketplace facilitators” and “referrers” from the definition of “remote retailers” that are subject to these new economic nexus provisions, as well as expands the general definition of “retailer engaged in business in this state” to include not only such remote retailers but also those engaged in selling “extended warranty services.” Other sales and use tax-related provisions contained in this bill include broadening the sales tax base by levying the tax on numerous additional enumerated services.

[URL: http://www.lrc.ky.gov/record/18RS/HB366.htm](http://www.lrc.ky.gov/record/18RS/HB366.htm)

Stay tuned for a forthcoming Multistate Tax Alert for more details on this legislation, and please contact us with any questions.

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## Indirect/Sales/Use:

### Oklahoma: New Law Requires Certain Marketplace Facilitators, Remote Sellers and Referrers to Collect and Remit Tax, or Else Adhere to Information Reporting and Notice Requirements

*H.B. 1019*, signed by gov. 4/10/18. Effective immediately and generally applicable by July 1, 2018 (and by June 1 of each calendar year in 2019 and thereafter), new law requires certain defined remote sellers to collect and remit Oklahoma sales and use tax on their in-state sales, *or else* elect to be subject to certain information reporting and notice requirements in Oklahoma. Similarly, this new law also requires certain defined marketplace facilitators and referrers to collect and remit Oklahoma sales and use tax on the underlying sales by third-party sellers in the applicable marketplace, and/or on the underlying sales by remote sellers or third-party marketplace sellers with whom they have a listing or advertising agreement, *or else* elect to be subject to Oklahoma’s information reporting and notice requirements. Such qualifying remote sellers, marketplace facilitators, and/or referrers are subject to these new provisions if they have at least \$10,000 in aggregate Oklahoma sales in the preceding twelve-calendar-month period.

[URL: http://webserver1.lsb.state.ok.us/cf\\_pdf/2017-18%20ENR/hB/HB1019XX%20ENR.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20ENR/hB/HB1019XX%20ENR.PDF)

The new law also provides that an election made on or before July 1, 2018, shall be in effect for the 2018-2019 fiscal year; and that such remote sellers, marketplace facilitators or referrers may change their election to comply with Oklahoma’s notice and reporting requirements to an election to collect and remit the applicable state sales and use tax “at any time during a fiscal year by filing a new election.” Such new election would be effective thirty days after the filing and would remain effective for the balance of the fiscal year in which the new election was filed, *and* for the next succeeding fiscal year. Additionally, if a qualifying remote seller, marketplace facilitator, or referrer elects to comply with Oklahoma’s notice and reporting requirements and then subsequently fails to comply, penalties may be imposed separately for each violation – and may equal the lesser of i) \$20,000, or ii) 20% of total Oklahoma sales in the previous twelve months. Please contact us with any questions.

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## Sales/Use:

### South Carolina: DOR Holds that Certain Monthly Online Video-Streaming Subscription Services Constitute Taxable Communications Services

*Private Letter Ruling No. 18-1*, S.C. Dept. of Rev. (4/10/18). The South Carolina Department of Revenue has issued a private letter ruling addressing the state sales/use taxation of certain described streaming subscription and related services, holding that the subscription charges for real-time viewing via Internet-based platforms of videos of individuals playing video games, music, sports or engaging in other activities (including similar content of third-party broadcasters and chat services) are subject to South Carolina sales and use taxes as charges for communications services under state law. Under the facts in this ruling, the taxpayer offers some of its viewing services free of charge, but also provides two described levels of enhanced viewing/chatting subscription-only services for stated monthly fees. Please contact us with any questions.

**URL:** <https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/PLR18-1.pdf>

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## Multistate Tax Alerts

Throughout the week, we highlight selected developments involving state tax legislative, judicial, and administrative matters. The alerts provide a brief summary of specific multistate developments relevant to taxpayers, tax professionals, and other interested persons. Read the recent alerts below or visit the [archive](#).

**Archive:** <http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-archive0.html?id=us:2em:3na:stm:awa:tax>

### California FTB Issues Three of Four Anticipated Reports on California's Conformity to 2017 Federal Income Tax Changes

The California Franchise Tax Board (FTB) has now issued three of the four anticipated reports addressing California's conformity to P.L. 115-97, "The 2017 Tax Reform Act" (the Act) – including such topics as the California tax implications of the new limit on the state and local tax (SALT) deduction; the FTB's consideration of the federal repatriation provisions; California's conformity to select provisions in the Act (such as the repeal of technical terminations of partnerships, the modification of certain business credits, insurance reform, modifications of limitations on executive compensation, and certain provisions impacting exempt organizations, S corporations, banks and financial instruments); and California's tax conformity to certain business-related provisions of the Act (such as the temporary 100% expensing for certain business assets, the limitation on the interest expense deduction, and modifications to the federal net operating loss deduction).

This Multistate Tax Alert provides an overview of these three reports addressing California's conformity to the Act. [Issued April 13, 2018]

**URL:** <https://www2.deloitte.com/us/en/pages/tax/articles/california-ftb-issues-three-of-four-anticipated-reports-on-californias-conformity-to-2017-federal-income-tax-changes.html?id=us:2em:3na:stm:awa:tax:042018>

### Enacted Wisconsin Legislation Provides for IRC Conformity Update and Other Tax Law Changes

On April 3, 2018, Governor Walker signed Assembly Bill 259, (2017 Wisconsin Act 231 (Act 231)) which includes the following notable amendments to Wisconsin tax law:

- Effective for taxable years beginning after December 31, 2016, and before January 1, 2018, updates Wisconsin corporate and individual income tax conformity to the Internal Revenue Code (IRC) as amended through December 31, 2016;
- Effective for taxable years beginning after December 31, 2017, updates Wisconsin corporate and individual income tax conformity to the IRC as amended through December 31, 2017, with decoupling from certain provisions of the 2017 Tax Reform Act;
- Updates the evidentiary standard for proving a transaction has economic substance; and

- Amends the rules by which a taxpayer may be precluded from relying on past audits conducted by the Wisconsin Department of Revenue.

This Multistate Tax Alert summarizes the significant provisions of the tax amendments provided by Act 231 and provides some taxpayer considerations.

[Issued April 17, 2018]

**URL:** <https://www2.deloitte.com/us/en/pages/tax/articles/enacted-wisconsin-legislation-provides-for-irc-conformity-update-and-other-tax-law-changes.html?id=us:2em:3na:stm:awa:tax:042018>

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36 USC 220506