

**First Regular Session
Sixty-eighth General Assembly
STATE OF COLORADO**

REVISED

*This Version Includes All Amendments Adopted
on Second Reading in the Second House*

LLS NO. 11-0069.01 Esther van Mourik

HOUSE BILL 11-1293

HOUSE SPONSORSHIP

Stephens and Murray,

SENATE SPONSORSHIP

Jahn and Newell, Spence

House Committees

Economic and Business Development
Appropriations

Senate Committees

Finance
Appropriations

A BILL FOR AN ACT

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

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)

On July 1, 2012, the bill repeals House Bill 10-1192 regarding the state sales and use tax of standardized software enacted by the general assembly and signed into law on February 24, 2010. The bill also repeals any related rules promulgated by the department of revenue and codifies

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.

Capital letters indicate new material to be added to existing statute.

Dashes through the words indicate deletions from existing statute.

SENATE
Amended 2nd Reading
May 6, 2011

HOUSE
Amended 3rd Reading
April 14, 2011

HOUSE
Amended 2nd Reading
April 13, 2011

into statute the department of revenue's special regulation related to the sales or use tax attributable to sales of computer software that was in effect prior to the effective date of House Bill 10-1192.

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

2 **SECTION 1. Repeal of regulations of the department of**
3 **revenue.** (1) Regulation 39-26-102.13, which rule was adopted January
4 19, 2011, is repealed, effective on the effective date of this section.

5 (2) The office of legislative legal services shall forward a copy of
6 House Bill 11-1293, enacted in 2011, to the secretary of state for purposes
7 of informing the secretary of state of the general assembly's action
8 repealing the rule specified in subsection (1) of this section. The
9 secretary of state shall delete Regulation 39-26-102.13 from the code of
10 Colorado regulations and include appropriate references of such repeal in
11 the code of Colorado regulations consistent with the provisions of section
12 24-4-103 (11), Colorado Revised Statutes.

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

15 **24-75-113. 2010 bills to increase state revenue - prohibition on**
16 **hiring of new state employees.** (3) ~~No moneys derived from the~~
17 ~~increase in state revenues resulting from the passage of House Bill~~
18 ~~10-1192, enacted in 2010, shall be appropriated for the purpose of~~
19 ~~funding additional full-time equivalent state employees.~~

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

22 **39-21-122. Revenue impact of 2010 tax legislation - tracking**
23 **by department.** (4) ~~The department of revenue shall account for all~~
24 ~~revenue attributable to the enactment of House Bill 10-1192, enacted in~~

1 2010, and shall, to the extent such information is available, make
2 quarterly reports to the general assembly regarding the quarterly and
3 cumulative net revenue gain to the state resulting from the enactment of
4 said bill.

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

7 **39-26-102. Definitions - repeal.** As used in this article, unless
8 the context otherwise requires:

9 (13.5) (a) (I) ~~"Standardized software" means:~~

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

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

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

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

25 (C) ~~Prior to January 1, 2011, it shall be sufficient if the~~
26 ~~reasonable, separately stated charge, invoice, or other statement of price~~
27 ~~referred to in sub-subparagraph (B) of this subparagraph (H) is separately~~

1 identifiable based on the books and records of the vendor and need not be
2 separately stated.

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

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

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

11 (b) For purposes of this subsection (13.5), "computer software" or
12 "software" means a set of coded instructions designed to cause a
13 computer or automatic data processing hardware to perform a task.

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

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

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

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

8 (c) (I) "TANGIBLE PERSONAL PROPERTY", COMMENCING JULY 1,
9 2012, SHALL INCLUDE COMPUTER SOFTWARE IF THE COMPUTER SOFTWARE
10 MEETS ALL OF THE FOLLOWING CRITERIA:

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

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

15 (C) THE COMPUTER SOFTWARE IS DELIVERED TO THE CUSTOMER
16 IN A TANGIBLE MEDIUM. COMPUTER SOFTWARE IS NOT DELIVERED TO THE
17 CUSTOMER IN A TANGIBLE MEDIUM IF IT IS PROVIDED THROUGH AN
18 APPLICATION SERVICE PROVIDER, DELIVERED BY ELECTRONIC COMPUTER
19 SOFTWARE DELIVERY, OR TRANSFERRED BY LOAD AND LEAVE COMPUTER
20 SOFTWARE DELIVERY.

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

23 (A) "APPLICATION SERVICE PROVIDER" OR "ASP" MEANS AN
24 ENTITY THAT RETAINS CUSTODY OVER OR HOSTS COMPUTER SOFTWARE
25 FOR USE BY THIRD PARTIES. USERS OF THE COMPUTER SOFTWARE HOSTED
26 BY AN ASP TYPICALLY WILL ACCESS THE COMPUTER SOFTWARE VIA THE
27 INTERNET. THE ASP MAY OR MAY NOT OWN OR LICENSE THE COMPUTER

1 SOFTWARE, BUT GENERALLY WILL OWN AND MAINTAIN HARDWARE AND
2 NETWORKING EQUIPMENT REQUIRED FOR THE USER TO ACCESS THE
3 COMPUTER SOFTWARE. WHERE THE ASP OWNS THE COMPUTER SOFTWARE,
4 THE ASP MAY CHARGE THE USER A LICENSE FEE FOR THE COMPUTER
5 SOFTWARE OR A FEE FOR MAINTAINING THE COMPUTER SOFTWARE OR
6 HARDWARE USED BY ITS CUSTOMER.

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

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

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

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

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

26 (G) "TEAR-OPEN NONNEGOTIABLE LICENSE AGREEMENT" MEANS
27 A LICENSE AGREEMENT CONTAINED ON OR IN THE PACKAGE, WHICH BY ITS

1 TERMS BECOMES EFFECTIVE UPON OPENING OF THE PACKAGE AND
2 ACCEPTING THE LICENSING AGREEMENT. "TEAR-OPEN NONNEGOTIABLE
3 LICENSE AGREEMENT" DOES NOT INCLUDE A WRITTEN LICENSE
4 AGREEMENT OR CONTRACT SIGNED BY THE LICENSOR AND THE LICENSEE.

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

14 (IV) IF A RETAILER SELLS COMPUTER SOFTWARE TO A COLORADO
15 PURCHASER THAT IS CONSIDERED TANGIBLE PERSONAL PROPERTY
16 TAXABLE PURSUANT TO SECTION 39-26-104 (1) (a) AND THE COLORADO
17 PURCHASER PAYS THE RETAILER FOR A QUANTITY OF COMPUTER
18 SOFTWARE LICENSES WITH THE INTENT TO DISTRIBUTE THE COMPUTER
19 SOFTWARE TO ANY OF THE PURCHASER'S LOCATIONS OUTSIDE OF
20 COLORADO, THE MEASURE OF COLORADO SALES TAX DUE IS THE TOTAL OF
21 THE LICENSE FEES ASSOCIATED ONLY WITH THE LICENSES THAT ARE
22 ACTUALLY USED IN COLORADO. THE COLORADO PURCHASER SHALL
23 PROVIDE A WRITTEN STATEMENT TO THE RETAILER, ATTESTING TO THE
24 AMOUNT OF THE LICENSE FEES ASSOCIATED WITH COLORADO AND WITH
25 POINTS OUTSIDE OF COLORADO. THE WRITTEN STATEMENT SHALL RELIEVE
26 THE RETAILER OF ANY LIABILITY ASSOCIATED WITH THE PRORATION.

27 **SECTION 5.** 39-26-709 (1) (c) (III), Colorado Revised Statutes,

1 is amended to read:

2 **39-26-709. Machinery and machine tools.** (1) (c) As used in
3 this subsection (1):

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

9

10 **SECTION 6. Effective date.** This act shall take effect July 1,
11 2012.

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