

## **FINAL PRIVATE LETTER RULING**

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### **REQUEST LETTER**

15-005

April 15, 2015

Office of the Commission  
Utah State Tax Commission  
210 N 1950 W  
Salt Lake City UT 84134

Also submitted via mail: taxplr@utah.gov

**RE: Request for Private Letter Ruling on the Taxability of Services**

To Whom it May Concern:

Our client (the “Company”) has engaged ACCOUNTING FIRM (“ACCOUNTING FIRM”) to assist them in obtaining a Private Letter Ruling regarding the taxability of charges for information services provided over the Internet. These services are provided to Financial Institutions to enable their Account Holders to do their banking online. At this time, the Company wishes to remain anonymous. However, the Company respectfully requests the opportunity to provide its name, address, identifying number, and taxpayer representative authorization to make the letter binding on the Utah State Tax Commission (the “Commission”).

**General Statements**

- On behalf of the Company, we seek a ruling from the Commission on the taxability of the Company’s services, as fully outlined below. We respectfully request that the Commission issue a letter ruling with respect to the taxability of these offerings.
- The issue or related issues of the Private Letter Ruling are not subject to an existing audit, protest, appeal, or litigation concerning the Company in Utah. The Company is not currently under audit by the Commission for any sales, use, or corporate income taxes. However, the Company has entered into Utah’s Voluntary Disclosure Program for sales and use taxes in conjunction with its request for a Private Letter Ruling.
- The Company respectfully requests that the names of the services provided, names of all parties involved, addresses, and taxpayer identification numbers be redacted from the final, published Private Letter Ruling. To assist the Commission, the Company will provide a proposed deletions request of the Private Letter Ruling prior to its publication.

## **Statement of Facts**

### *A. Service Offerings*

The Company is an out-of-state corporation with customers located throughout the country, including Utah. The Company's customers are financial institutions, including banks and federal and state credit unions (Financial Institutions). In order for Financial Institutions to remain competitive, they must be able to offer online banking to their account holders. The Company is the outsourced provider of Financial Institutions for online banking. The Company provides services over the Internet that allows account holders of a Financial Institution (Account Holder) to view and manage their personal bank accounts online. Specifically, the Company provides the Financial Institutions the ability to offer Account Holders the following services: Online Banking, Online Bill Payment, Finance and Budget Tool, and Mobile Banking.

The following is a detailed description of these service offerings:

- **Online Banking.** The Company's Online Banking service enables Financial Institutions to offer Account Holders online access to their personal bank account information through an online banking webpage unique to the Account Holder's Financial Institution. The Company's Online Banking webpage seamlessly displays the Account Holder's personal bank account information that is provided by the Financial Institution or agents of the Financial Institution in real-time. An Account Holder is also able to view online statements and past transactions.

The Company creates the unique banking webpage for the Financial Institution in order to perform its services. The Company does not turn over control over the website to the Financial Institution. Any changes that might be suggested by the Financial Institution must be made by the Company and not the Financial Institutions. The Company uses the website to provide its services.

- **Finance and Budget Tool.** An add-on service to Online Banking is the Finance and Budget Tool. The Finance and Budget Tool utilizes the Account Holder's banking information to categorize the Account Holder's personal spending (e.g., restaurants, gas, retail, and utilities). In addition, the Finance and Budget Tool allows Account Holders to create budgets and monitor their individual spending and savings activities.
- **Online Bill Payment.** Another add-on service to Online Banking is Online Bill Payment. Online Bill Payment is a service offering that allows an Account Holder to send payments to any company or person within the United States. All payments are processed by third-party vendors of the Financial Institutions' choosing. When an Account Holder initiates an Online Bill Payment, the Company connects the Account Holder to the third-party vendor selected by the Financial Institution through a single sign-on user interface hosted by the third-party bill payment processor. The third-party

bill payment processor handles funds transfers in accordance with the Account Holder's instructions.

- Mobile Banking. The final add-on service to Online Banking is Mobile Banking. As part of its Mobile Banking service offerings, the Company offers Account Holders access to Online Banking from cell phones, tablets, and other mobile devices. Similar to the online banking website, the mobile banking website is customized and branded as to provide the Account Holder with a similar experience of accessing Online Banking from a personal computer. Like Online Banking, the Account Holder gains access to account balances, history, and other add-on services such as Online Bill Payments.

In addition, the Company enables Financial Institutions the ability to offer Account Holders a mobile banking application that can be downloaded for free on an iPhone or Android smartphone. With the mobile banking application, the Account Holder can access account balances, history, and other services directly from within the electronically downloaded app rather than on an Internet browser. Although the Account Holder may download the mobile banking application for free, the Company charges fees to Financial Institutions for offering this service on behalf of the Financial Institutions.

In performing the above services, the Company utilizes its proprietary platform. This platform is used exclusively by the Company in performing its services. Financial Institutions do not have rights or access to control or manipulate the Company's platform. Financial Institutions only provide and receive certain data feeds to and from the Company. Except for the mobile banking application, the Company does not sell, license, or transfer any software to Financial Institutions or Account Holders nor does the Company separately charge for use of its platform. In addition, neither the Financial Institution nor Account Holders have the ability to modify or control the Company's proprietary platform used by the Company in performing its services except in the processing of online bill payments. In the case of Online Bill Payment services, Account Holders still do not have the ability to modify or control the platform but simply have the limited ability to authorize amounts to be paid for the purposes of processing bill payments.

#### *B. Customers*

As discussed above, the Company's customers are financial institutions, many of which are federal credit unions. Under federal law a state cannot tax federal credit unions. (12 U.S.C. Sec. 1768.)

#### *C. Fees*

The Company has various billing methods depending on the Financial Institution and services selected. The Company may bill a monthly or annual service fee, charge on a per transaction basis for online bill payment, or charge based on the number of Account Holders. In addition, the Company may charge initial setup fees separate from any service offerings. The Company does not receive fees from Account Holders; all services are provided for the Financial Institution itself, although the end-user is the Account Holder. It is up to the Financial Institution as to whether the Account Holder is charged for access or use of any of the above service

offerings and the Financial Institution would charge the Account Holders. Moreover, except for fees charged to Financial Institutions for downloaded mobile banking applications, the Company does not charge Financial Institutions for any software.

#### *D. Service Documentation Agreements*

In contracting with Financial Institutions, the Company enters into a Master Services Agreement and separate Service Documentation Agreements based on the services selected. Attached are a sample Master Services Agreement and Service Documentation for Online Banking, Online Bill Payment, Mobile Banking, and Mobile Banking Application. As indicated in each agreement, except for mobile banking applications, the agreements are for licenses of services and not the licenses of software.

For example, in the Master Services Agreement, the Company grants a “non-exclusive, non-sublicensable, and non-transferable (except as expressly set forth in this Agreement) license to access and use: (a) the Services as made available by [the Company], solely for the purpose of receiving the Authorized Services and providing the Services’ functionality to End Users; and (b) the Service Documentation solely in connection with Customer’s access and use of the Services’ as expressly permitted by this Agreement.” In Service Documentation agreements, the Company contracts to provide enumerated services such as “provide to eligible End Users with personal computers (PCs running compatible browsers) with the following functionality:” “view payments,” “schedule payments,” and “bill presentment.”

#### **Issue**

Whether the Company’s services: Online Banking, Online Bill Payment, Finance and Budget Tool, and Mobile Banking are subject to Utah sales or use tax.

#### **Suggested Ruling**

The charges for Online Banking, Online Bill Pay, and Mobile Banking services within Utah are not subject to Utah sales or use tax as they represent the sale of non-taxable information and data processing services. Charges for Finance and Budget Tool and electronic download of the mobile banking application within Utah are taxable.

#### **Discussion**

Utah imposes sales tax on the retail sale of tangible personal property, including prewritten software, and enumerated services. (*See* Utah Code Ann. §§ 59-12-103(1)(a), 59-12-102.) Data processing and information services are not enumerated taxable services. (*See* Utah Code Ann. §§ 59-12-103(1)(a), 59-12-102; Opinion No. 10-012.) Utah Code defines data processing and information service as data acquired, generated, processed, retrieved, or stored and delivered electronically to the purchaser, in which the purchaser’s primary purpose is to obtain the processed data or information. (Utah Code Ann. § 59-12-102(125(c).))

Here, the Company offers Online Banking, Online Bill Payment, and Mobile Banking services over the Internet through its proprietary platform. None of these services are enumerated services in Utah. Moreover, the Company's services meet the definition of data processing and information services and therefore are non-taxable services. In providing its services, data is acquired, generated, processed, retrieved, or stored by the Company, and is delivered electronically with the primary purpose of providing processed data or information to Account Holders. Thus, the Company's charges for Online Banking, Online Bill Pay, and Mobile Banking are not subject to Utah sales or use tax as non-taxable data processing and information services.

Further supporting the position that these services are non-taxable, Utah previously determined that similar services are not subject to tax. In Private Letter Ruling, Opinion No. 10-012, the Commission held that the taxpayer's sales of access to its online database and upgraded data packages via the Internet are not subject to Utah sales and use tax because they are sales of data processing and information services. The Commission concluded, however, that the taxpayer's sale of add-on services were subject to Utah sales and use tax as sales of prewritten software. The taxpayer, for a subscription fee, granted its customers access to business information about potential or existing customers and suppliers through its online database. The taxpayer's core services allowed customers to run searches and create customizable reports containing summary trade data, basic credit scores, legal filings, and general company information. For an additional fee, customers could purchase upgraded data packages and workflow add-ons that provided additional data beyond core service offering.

The upgraded data package included: access to additional corporate information and related companies; a visual family tree report; a summary of public filings and financial statements; monitoring and alerts sent via email; credit recommendations; predictive and comprehensive credit scores and fraud scores; access to historical payment data with information about delinquency and average payments; and access to additional financial data. The workflow add-ons included: access to a web-based tool to assist companies make immediate credit decisions about new customers based on credit reports and bank references; ability to monitor various business activities based on user inputted data; ability to create a customizable credit application for a user's customers to complete; and other web-services that allowed for data and account information to integrate core services and workflow add-on services.

As noted above, the Commission concluded that the taxpayer's core services and upgraded data package sold as a bundled annual subscription were not subject to Utah sales or use tax because the services are data processing and information services, and as such, are not taxable. The Commission, however, concluded that the workflow add-on services are prewritten software since the object of the transaction was the use of prewritten computer software, and as such, are taxable. Although the workflow add-on services were hosted on third-party servers and the customer did not download software, the Department reasoned that the workflow add-on services are prewritten software because the workflow add-ons instruct a computer how to perform a task.

Here, although the Company uses its proprietary platform in performing its services, as evidenced in the Service Documentation Agreements, the Company's services are not sales of tangible personal property as there is no sale, license, or transfer of software by the Company to

the Financial Institutions or Account Holders nor does the Company separately charge for use of its platform. In addition, as indicated in the Service Documentation Agreements and like the taxpayer in Opinion No. 10-012, the Company does not transfer constructive possession of its proprietary platform to Financial Institutions or Account Holders. The platform is used exclusively by the Company in performing its services. Unlike the taxpayer's customers in Opinion No. 10-012 that could input data into the web-based application to modify or control the software tools, neither the Financial Institution nor Account Holders have the ability to modify or control the Company's proprietary platform. Financial Institutions only provide and receive certain data feeds from the Company. In the case of Online Bill Payment services, which are akin to data processing services, Account Holders still do not have control over the software but have the limited ability, as permitted by the Company, to enter individual data into a database used by the software for the purposes of transmitting information to third-party online bill payment processors for the processing of bill payments. In addition, unlike the workflow add-on services in Opinion No. 10-012 that allowed the taxpayer's customers to input their own information, combine that information with the taxpayer's database, and then use the software to make business decisions based on the combined information, the Company's services – other than Finance and Budget Tool – provide limited functionality and only present the Account Holder's personal information in different formats and categories to assist with budgeting.

Moreover, in applying the essence of the transaction test,<sup>1</sup> the essence of the Company's transactions is for Financial Institutions to provide custom information services for its Account Holders through Online Banking, Online Bill Payment, and Mobile Banking services. With these services, Financial Institutions can offer Account Holders the ability to view their bank accounts and authorize bill payments online. As there is no separate charge for the platform used in providing the services, and the Company does not license, sell, or transfer the platform to Account Holders or Financial Institutions, the essence of the transaction is not tangible personal property, but instead non-taxable services.

Accordingly, except for specific charges related to the electronic download of the mobile banking application and charges for its Finance and Budget Tool, the Company's services within Utah as outlined above are not subject to Utah sales or use tax.

Even if the Commission determines the Company's services are not non-taxable data processing or information services, the Company's services should be considered non-taxable charges to access a database where the primary purpose for accessing the database is to view or retrieve information. Account Holders are able to access the Financial Institutions' account databases in order to see the transactions occurring in their accounts. Effective July 1, 2013, Utah exempts such charges. (Utah Code Ann. § 59-12-104(78).)

## **Conclusion**

In conclusion, the Company's charges for Online Banking, Online Bill Pay, and Mobile Banking services within Utah are not subject to Utah sales or use tax as they represent the sale of non-

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<sup>1</sup> See Haroldsen, Inc. v. State Tax Commission, 805 P.2d 176 (Nov. 27, 1990).

taxable information and data processing services. Charges for Finance and Budget Tool and electronic download of the mobile banking application within Utah are taxable.

\* \* \* \* \*

I trust that this information is sufficient to enable you to render a ruling. If, however, you should have any questions or require additional information, please do not hesitate to contact me at PHONE NUMBER-1 or NAME-1 WEB ADDRESS-1, or NAME-2 at PHONE NUMBER-2 or WEB ADDRESS-2. Please direct all written correspondence pertaining to this matter to me at the address listed below.

ACCOUNTING FIRM  
Attn: NAME-1  
ADDRESS-1  
CITY-1, STATE-1 ZIP CODE

Sincerely,

NAME-1,  
Partner – State and Local Tax  
**ACCOUNTING FIRM**

**RESPONSE LETTER**

**PRIVATE LETTER RULING 15-005**

November 16, 2015

Mr. NAME-1  
Partner – State and Local Tax  
ACCOUNTING FIRM  
Suite- #####  
ADDRESS-2  
CITY-1, STATE-1 ZIP CODE

RE: Private Letter Ruling Request – Sales and Use Taxability of Services or Computer Software Supporting Online Banking

Dear NAME-1:

This letter is in response to your request for a private letter ruling on behalf of your client (“Company”). You have inquired whether the Company’s sales of the following offerings (“Offerings”) are subject to Utah sales and use taxes:

- Online banking
- Online bill payment
- Finance and budget tool
- Mobile banking

You have characterized sales of these Offerings as sales of services. Based on the facts presented, though, the Company’s sales of the Offerings are sales of tangible personal property and are subject to Utah sales and use taxes when the Company’s customers (“Financial Institutions”) are located in Utah. Please note, **this private letter ruling does not address special situations such as when the Company’s customer is a federal credit union.** In your request letter, you briefly wrote that “many of [the Company’s customers] are federal credit unions. Under federal law a state cannot tax federal credit unions. (12 U.S.C. Sec. 1768).” However, you provided no further discussion or analysis about this issue. In general, interactions between federal law and state law can cause certain items to be excluded from taxability for state tax purposes. However, because you provided no further discussion of the issue, this private letter ruling does not address 12 U.S.C. § 1768. Instead, this private letter ruling analyzes the state taxability of the transaction you presented absent any possible exclusions created by federal law or any potential exemptions found in state law other than the

exemption created in Utah Code Ann. § 59-12-104(78), which is expressly addressed in this private letter ruling.<sup>1</sup>

## I. Facts

In your letter, you explained the following facts. The Company is an out-of-state corporation. It sells the Offerings to Financial Institutions. The Financial Institutions include banks and credit unions, some of which are located in Utah. The Financial Institutions purchase one or more of the Offerings to enable the Financial Institutions' account holders ("Account Holders") to do online banking with the bank accounts they have with the Financial Institutions.

In your letter, you explained the following about each of the Offerings:

- Online Banking. The Company's Online Banking service enables Financial Institutions to offer Account Holders online access to their personal bank account information through an online banking webpage unique to the Account Holder's Financial Institution. The Company's Online Banking webpage seamlessly displays the Account Holder's personal bank account information that is provided by the Financial Institution or agents of the Financial Institution in real-time. An Account Holder is also able to view online statements and past transactions.

The Company creates the unique banking webpage for the Financial Institution in order to perform its services. The Company does not turn over control [of] the website to the Financial Institution. Any changes that might be suggested by the Financial Institution must be made by the Company and not the Financial Institutions. The Company uses the website to provide its services.

- Finance and Budget Tool. An add-on service to Online Banking is the Finance and Budget Tool. The Finance and Budget Tool utilizes the Account Holder's banking information to categorize the Account Holder's personal spending (e.g., restaurants, gas, retail, and utilities). In addition, the Finance and Budget Tool allows Account Holders to create budgets and monitor their individual spending and savings activities.
- Online Bill Payment. Another add-on service to Online Banking is Online Bill Payment. Online Bill Payment is a service offering that allows an

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<sup>1</sup> The Utah State Tax Commission has a sales tax exemption certificate which might apply to situations involving federal credit unions. This exemption certificate is Form TC-721G: Exemption Certificate for Governments & Schools, which can be used for "sales of tangible personal property to federally chartered credit unions." For more direction on this area, you may contact the Taxpayer Services Division, Technical Research Unit, by phone at 801-297-7705, by email at taxmaster@utah.gov, or by mail at 210 N 1950 W, Salt Lake City, UT 84134.

Account Holder to send payments to any company or person within the United States. All payments are processed by third-party vendors of the Financial Institutions' choosing. When an Account Holder initiates an Online Bill Payment, the Company connects the Account Holder to the third-party vendor selected by the Financial Institution through a single sign-on user interface hosted by the third-party bill payment processor. The third-party bill payment processor handles funds transfers in accordance with the Account Holder's instructions.

- Mobile Banking. The final add-on service to Online Banking is Mobile Banking. As part of its Mobile Banking service offerings, the Company offers Account Holders access to Online Banking from cell phones, tablets, and other mobile devices. Similar to the online banking website, the mobile banking website is customized and branded as to provide the Account Holder with a similar experience of accessing Online Banking from a personal computer. Like Online Banking, the Account Holder gains access to account balances, history, and other add-on services such as Online Bill Payments.

In addition, the Company enables Financial Institutions the ability to offer Account Holders a mobile banking application that can be downloaded for free on an iPhone or Android smartphone. With the mobile banking application, the Account Holder can access account balances, history, and other services directly from within the electronically downloaded app rather than on an Internet browser. Although the Account Holder may download the mobile banking application for free, the Company charges fees to Financial Institutions for offering this service on behalf of the Financial Institutions.

You also explained the Company uses its own proprietary platform to provide the Offerings. The Financial Institutions and Account Holders cannot modify or control the Company's platform. The Company does not separately charge for the use of its platform. The "Financial Institutions [can] only provide and receive certain data feeds to and from the Company." Other than the downloadable mobile banking application, the Company's sales of the Offerings do not include the "[sale], license, or transfer [of] software to [the] Financial Institutions or Account Holders." For the downloadable mobile banking application, as explained in "Mobile Banking" above, the Company charges Financial Institutions fees for the downloads of the application by Account Holders.

You explained the Company's billing as follows:

The Company has various billing methods depending on the Financial Institution and services selected. The Company may bill a monthly or annual service fee, charge on a per transaction basis for online bill payment, or charge based on the number of Account Holders. In addition, the Company may charge initial setup fees separate from any service offerings. The Company does not receive fees from Account Holders; all services are provided for the Financial Institution itself, although the end-user is the Account Holder. It is up to the Financial Institution

as to whether the Account Holder is charged for access or use of any of the above service offerings and the Financial Institution would charge the Account Holders. Moreover, except for fees charged to Financial Institutions for downloaded mobile banking applications, the Company does not charge Financial Institutions for any software.

The Company enters into a Master Service Agreement and Service Documentation agreements (“Agreements”) with the Financial Institutions. You have provided a sample of these Agreements. You explained that “except for the mobile banking applications, the agreements are for licenses of services and . . . not software.” You explained the following:

For example, in the Master Services Agreement, the Company grants a “non-exclusive, non-sublicensable, and non-transferable (except as expressly set forth in this Agreement) license to access and use: (a) the Services as made available by [the Company], solely for the purpose of receiving the Authorized Services and providing the Services’ functionality to End Users; and (b) the Service Documentation solely in connection with Customer’s access and use of the Services’ as expressly permitted by this Agreement.” In Service Documentation agreements, the Company contracts to provide enumerated services such as “provide to eligible End Users with personal computers (PCs running compatible browsers) with the following functionality:” “view payments,” “schedule payments,” and “bill presentment.”<sup>2]</sup>

These Agreements also provide additional facts about the sales of the Offerings, such as the facts that follow. The Company’s personnel instruct the Financial Institutions on the technological requirements and other requirements needed to implement the Offerings.<sup>3</sup> The Company’s personnel train the Financial Institutions’ personnel on the Offerings.<sup>4</sup> That training would seem to include the training of the Financial Institutions’ personnel on the use of the “Management Console.” Through the Management Console, the Financial Institutions’ personnel perform the following administrative functions:<sup>5</sup>

- (a) Start/stop the internet banking services.
- (b) Hold/enable/display/reset individual Account Holders that are enrolled in the system.
- (c) Set the Regulation E description message.
- (d) Set the ‘Message of the Day’ on home banking sign-on screen.

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<sup>2</sup> WORDS REMOVED

<sup>3</sup> WORDS REMOVED

<sup>4</sup> WORDS REMOVED.

<sup>5</sup> WORDS REMOVED

- (e) Display, print and download various activity logs and reports that provide detailed activity of the Financial Institution’s online banking service.
- (f) Maintain authorized employee users of the Financial Institution.

Additionally, the Agreements provide that the Company’s personnel do not interact with the Account Holders. Instead, Financial Institutions’ personnel are “solely responsible for providing assistance to its End Users [Account Holders] regarding access to and use of the [Offerings].”<sup>6</sup> The Financial Institutions and the Account Holders must have the correct hardware and software to receive the Offerings.<sup>7</sup> The Offerings are intended to be available on a continuous basis other than during times of scheduled maintenance.<sup>8</sup> The Financial Institutions are not to “decompile, disassemble, or otherwise reverse engineer . . . the Services or Software, or determine or attempt to determine any source code, algorithms, methods or techniques embodied in the Services or Software or any portion thereof . . .”<sup>9</sup> The Financial Institutions are to “receive all improvements, enhancements, modifications and updates to the Authorized Services . . . free of charge.”<sup>10</sup>

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<sup>6</sup> WORDS REMOVED

<sup>7</sup> WORDS REMOVED

<sup>8</sup> WORDS REMOVED

<sup>9</sup> WORDS REMOVED

<sup>10</sup> WORDS REMOVED

## II. Issue

The issue for this private letter ruling is whether the Company's sales to Financial Institutions of the following Offerings are subject to Utah sales and use taxes:<sup>11</sup>

- Online banking
- Online bill payment
- Finance and budget tool
- Mobile banking

Based on the facts presented, the sales of the Offerings are subject to Utah sales and use taxes if the Financial Institutions, which are the Company's customers, are located in Utah. The analysis for this conclusion is located in the "IV. Analysis" section of this ruling.

## III. Applicable Law

Utah Code Ann. § 59-12-103(1) imposes Utah sales and use tax and states the following in part:

A tax is imposed on the purchaser . . . for amounts paid or charged for the following transactions:

(a) retail sales of tangible personal property made within the state . . .

. . . .

(k) amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is:

- (i) stored;
- (ii) used; or
- (iii) otherwise consumed;

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<sup>11</sup> Your request letter states: "[T]he Company may charge initial setup fees separate from any service offerings." This private letter ruling does not address the initial setup fees for the following reasons. You characterized the issue for this private letter ruling as whether the sales of the Offerings are taxable, and you have explained the initial setup fees are charged separately from those for any Offerings. Also, you have not explained what the Company provides the Financial Institutions in exchange for the initial setup fees. Furthermore, the Master Services Agreement does not simply explain the initial setup fees, either. Instead, the Master Services Agreement includes many fees in addition to setup fees, including fees for the following items: additional training and consulting (§ ##), set-up, license, and training (§ ##), taxes (§ ##), optional services (§ ##), development of an interface (§ ##), termination (§ ##), customer requests regarding regulatory audit process requirements (§ ##), frame relay and host connectivity (Master Service Agreement, Ex. A), website maintenance (Master Service Agreement, Ex. B, § ##), rush website maintenance (Master Service Agreement, Ex. B, § ##), website development (Master Service Agreement, Ex. B, § ##), access to facilities and conduits (Master Service Agreement, Ex. C, § ##), etc.

If you have questions about the taxability of the separately-stated initial setup fees, you may contact the Taxpayer Services Division, Technical Research Unit, using the contact information at the end of footnote 1.

- (l) amounts paid or charged for tangible personal property if within this state the tangible personal property is:
  - (i) stored;
  - (ii) used; or
  - (iii) consumed . . .

....

Utah Code Ann. § 59-12-102 defines multiple terms, including the following in part:

- (26) "Computer" means an electronic device that accepts information:
  - (a) (i) in digital form; or
  - (ii) in a form similar to digital form; and
  - (b) manipulates that information for a result based on a sequence of instructions.
- (27) "Computer software" means a set of coded instructions designed to cause:
  - (a) a computer to perform a task; or
  - (b) automatic data processing equipment to perform a task.

....

- (93) (a) . . . . *"prewritten computer software" means computer software that is not designed and developed:*
  - (i) *by the author or other creator of the computer software; and*
  - (ii) *to the specifications of a specific purchaser.*
- (b) "Prewritten computer software" includes:

....

- (iii) except as provided in Subsection (93)(c), prewritten computer software or a prewritten portion of prewritten computer software:
  - (A) that is modified or enhanced to any degree; and
  - (B) if the modification or enhancement described in Subsection (93)(b)(iii)(A) is designed and developed to the specifications of a specific purchaser.

- (c) "Prewritten computer software" does not include a modification or enhancement described in Subsection (93)(b)(iii) if the charges for the modification or enhancement are:
  - (i) reasonable; and
  - (ii) subject to Subsections 59-12-103(2)(e)(ii) and (2)(f)(i), separately stated on the invoice or other statement of price provided to the purchaser at the time of sale or later, as demonstrated by:
    - (A) the books and records the seller keeps at the time of the transaction in the regular course of business, including books and records the seller keeps at the time of the transaction in the regular course of business for nontax purposes;
    - (B) a preponderance of the facts and circumstances at the time of the transaction; and
    - (C) the understanding of all of the parties to the transaction.

....

(107) "Retail sale" or "sale at retail" means a sale, lease, or rental for a purpose other than:

- (a) resale;
- (b) sublease; or
- (c) subrent.

....

(109)(a) "Sale" means any transfer of title, exchange, or barter, conditional or otherwise, in any manner, of tangible personal property or any other taxable transaction under Subsection 59-12-103(1), for consideration.

(b) "*Sale*" includes:

....

- (v) *any transaction under which right to possession, operation, or use of any article of tangible personal property is granted under a lease or contract and the transfer of possession would be taxable if an outright sale were made.*

....

(124) ....

(b) "*Tangible personal property*" includes:

....

- (v) *prewritten computer software, regardless of the manner in which the prewritten computer software is transferred.*

....

(128) ....

(c) "Telecommunications service" does not include:

....

- (iv) a data processing and information service if:
  - (A) the data processing and information service allows data to be:
    - (I) (Aa) acquired;
    - (Bb) generated;
    - (Cc) processed;
    - (Dd) retrieved; or
    - (Ee) stored; and
  - (II) delivered by an electronic transmission to a purchaser; and
- (B) *the purchaser's primary purpose for the underlying transaction is the processed data or information. . .*

....

(Emphasis added.)

Utah Code Ann. § 59-12-211(12) provides the location of sales that involve the purchasers' use of software when there is not a transfer of a copy of the software, with Subsection (12) stating the following:

- (a) Notwithstanding any other provision of this section and except as provided in Subsection (12)(b), *if a purchaser uses computer software and there is not a*

*transfer of a copy of that software to the purchaser*, the location of the transaction is determined in accordance with Subsections (4) and (5).

- (b) If a purchaser uses computer software described in Subsection (12)(a) at more than one location, the location of the transaction shall be determined in accordance with rules made by the commission in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(Emphasis added.)

When § 59-12-211(12) applies, subsections (4) and (5) of Utah Code Ann. § 59-12-211 locate transactions at an address for the purchaser.<sup>12</sup>

Utah Code Ann. § 59-12-104(78) exempts from Utah sales and use taxes the following:

[A]mounts paid or charged to access a database:

- (a) if the primary purpose for accessing the database is to view or retrieve information from the database; and
- (b) not including amounts paid or charged for a:
  - (i) digital audiowork;
  - (ii) digital audio-visual work; or
  - (iii) digital book . . .

#### IV. Analysis

The Company's sales of the Offerings to Financial Institutions located in Utah are subject to Utah sales and use taxes under § 59-12-103(1)(a), (k), and (l) as "amounts paid or charged for . . . retail sales of tangible personal property made within the state . . ." (under subsection (1)(a)); as "amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is . . . used . . . or . . . otherwise consumed" (under subsection (1)(k)); and as "amounts paid or charged for tangible personal property if within this state the tangible personal property is . . . used . . . or . . . consumed . . ." (under subsection (1)(l)). After considering the facts presented, the essence of the transaction between the Company and the Financial Institutions is the sale of the use of the Company's prewritten computer software and not the sale of the services of the Company's personnel.

In this section the analysis explains, first, why the Company's sales of the Offerings could be taxable depending on the essence of the transaction; second, why the essence of the transaction is the sale of the use of the Company's application software; third, why the Offerings are not data processing and information services; and fourth, why the sales of the Offerings are not exempt under § 59-12-104(78), as amounts paid or charged to access a database.

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<sup>12</sup> For more direction on the application of § 59-12-211 to the situation you have presented, you may contact the Taxpayer Services Division, Technical Research Unit, using the contact information at the end of footnote 1.

**A. The Company’s Sales of the Offerings Could be Taxable Transactions Involving Tangible Personal Property, Depending on the Essence of the Transaction, the Analysis of Which is in Subsection IV. B.**

Under § 59-12-102(27), “[c]omputer software means a set of coded instructions designed to cause . . . a computer to perform a task” (internal quotes omitted). All Offerings you present involve software applications that run on the Company’s proprietary platform. We interpret “platform” to include the Company’s basic computer hardware and operating system.

Under § 59-12-102(93)(a) “prewritten computer software means computer software that is not designed and developed . . . by the . . . creator of the computer software . . . to the specifications of a specific purchaser” (internal quotes omitted). The software applications running on the Company’s platform are not designed and developed by the Company to the specifications of a specific Financial Institution. Thus, the software applications are prewritten computer software.

Under § 59-12-102(124)(b)(v), prewritten computer software is tangible personal property. Transactions involving tangible personal property are subject to Utah sales and use taxes under the following subsections:

- Section 59-12-103(1)(a), for “retail sales of tangible personal property made within the state”
- Section 59-12-103(1)(k), for “amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is . . . used . . . or . . . otherwise consumed”
- Section 59-12-103(1)(l), for “amounts paid or charged for tangible personal property if within this state the tangible personal property is . . . used . . . or . . . consumed . . .”

For purposes of § 59-12-103(1)(a), (k), and (l), § 59-12-102(109)(b)(v) broadly defines “sale” to include “any transaction under which *right to . . . use* of any article of tangible personal property is granted under a lease or contract and the transfer of possession would be taxable if an outright sale were made” (emphasis added).<sup>13</sup> Thus, if the sales of the Offerings are essentially sales of the right to use the software applications on the Company’s platform, the sales of such would be taxable under § 59-12-103(1)(a) as a retail sale of tangible personal property if the sales are “made within the state.” Alternatively, such sales could also be taxable under § 59-12-103(1)(k)

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<sup>13</sup> Under § 59-12-102(107), a “[r]etail sale” . . . means a sale, lease, or rental for a purpose other than: (a) resale; (b) sublease; or (c) subrent.” You briefly indicated that the Financial Institutions could decide whether to charge their Account Holder for the Financial Institution’s services that utilize the Offerings. Because of the uncertainty and the lack of details about such possible transactions between Financial Institutions and their Account Holders, this private letter ruling does not analyze those transactions, and this private letter ruling analyzes the Company’s sales to the Financial Institutions as *retail sales*.

and (1)(l) if the Financial Institutions are using or consuming the Company's application software within this state.

Section 59-12-211(12) addresses whether certain transactions are made within this state, with § 59-12-211(12) stating the following:

[I]f a purchaser uses computer software and there is not a transfer of a copy of that software to the purchaser, the location of the transaction is [the address for the purchaser].

Thus, if the sales of the Offerings are sales of the use of the application software, then the sales are subject to Utah sales and use taxes if the Financial Institutions are located in Utah.

**B. The Essence of the Transaction of the Sales of the Offerings is the Company's Sale of the Use of the Company's Application Software; Thus, the Sales of the Offerings are Subject to Utah Sales and Use Taxes when the Transactions are Located Within this State.**

To determine whether the sales of the Offerings are the sales of the services of the Company's personnel or the sales of the use of the Company's software applications, one must consider the essence of, or primary object of, the transaction. The Utah Supreme Court has explained the essence of the transaction as follows:

[T]he essence of the transaction theory[] focuses on the nature of what was sold and whether it primarily entails tangible personal property. . . . This theory examines the transaction as a whole to determine whether the essence of the transaction is one for services or for tangible personal property. The analysis typically requires a determination either that the services provided are merely incidental to an essentially personal property transaction or that the property provided is merely incidental to an essentially service transaction. . . .

*B.J.-Titan Services v. State Tax Comm'n*, 842 P.2d 822, 825 (Utah 1992) (Internal citations removed).

To decide whether the essence of the transaction presented is for services provided by the Company's personnel or for the use of the Company's application software, one must consider the nature and extent of both (1) the services provided by the Company's personnel and (2) the use of the application software.

*1. Nature and Extent of the Services Provided by the Company's Personnel*

For the Offerings, Company's personnel establish the Financial Institutions' websites. They also register website domain names and construct and maintain the Internet webpages and

the mobile banking websites for the Financial Institutions.<sup>14</sup> You presented the purpose of the websites as follows:

The Company creates the unique banking webpage for the Financial Institution *in order to perform its services. . . .* The Company uses the website *to provide its services.*

(Emphasis added.)

Based on your explanation, the primary purpose of the Internet webpages and the mobile websites is to establish the means through which the Company provides the Financial Institutions with the Offerings.”<sup>15</sup>

Your request letter does not explain additional services performed by the Company’s personnel for the Financial Institutions. However, based on the Agreements, the Company’s personnel also instruct the Financial Institutions on the technological and other requirements needed to implement the Offerings and train the Financial Institutions’ personnel on the Offerings. Furthermore, that training seems to include training the Financial Institutions’ personnel on the use of the “Management Console,” through which the Financial Institutions’ personnel perform the following administrative functions:

- (a) Start/stop the internet banking services.
- (b) Hold/enable/display/reset individual Account Holders that are enrolled in the system.
- (c) Set the Regulation E description message.
- (d) Set the ‘Message of the Day’ on home banking sign-on screen.
- (e) Display, print and download various activity logs and reports that provide detailed activity of the Financial Institution’s online banking service.
- (f) Maintain authorized employee users of the Financial Institution.

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<sup>14</sup> It is unclear whether a Financial Institution’s payment for the Company’s services for the webpages and websites is part of the fees paid by the Financial Institution for the Offerings or whether the payment for these services is part of the initial setup fee charged separately from the Offerings.

<sup>15</sup> In other circumstances, the purchase of websites specifically designed for individual customers could be nontaxable. PLR 01-030, quoted in PLR 09-002, explains that when a “customer is primarily purchasing the Company’s expertise in knowing what designs work best on a website and how to incorporate the various designs into a website,” such a transaction could be a nontaxable purchase of graphic design services, but when a customer “is primarily purchasing a website with the [seller’s] design services being a secondary concern,” such a transaction could be a taxable purchase of tangible personal property. PLR 01-030 and PLR 09-002 are available online through the webpage found at <http://tax.utah.gov/commission-office/rulings>.

Furthermore, the Agreements also state that the Company’s personnel do not interact with the Account Holders. Instead, the Financial Institutions’ personnel are “solely responsible for providing assistance to its End Users [Account Holders] regarding access to and use of the [Offerings].” The Company’s services of instruction, training, and support seem technical in nature.

## 2. *Nature and Extent of the Use of the Company’s Application Software*

The Company’s application software is integral in providing the Offerings. The Financial Institutions and the Account Holders must have the correct hardware and software to benefit from the Offerings. The Financial Institutions’ personnel must be trained to use the Management Console to perform certain administrative functions connected with the Offerings. The Offerings are intended to be available on a continuous basis other than during times of scheduled maintenance. The Financial Institutions are not to “decompile, disassemble, or otherwise reverse engineer . . . the Services or Software, or determine or attempt to determine any source code, algorithms, methods or techniques embodied in the Services or Software or any portion thereof . . .” The Financial Institutions are to “receive all improvements, enhancements, modifications and updates to the Authorized Services . . . free of charge.”

## 3. *Determination of the Essence of the Transaction*

After reviewing the facts relating to the nature and extent of both the services provided by the Company’s personnel and the use of the Company’s application software, the essence of the transaction between the Company and the Financial Institutions is to provide the Financial Institutions with the use of the Company’s application software. The Financial Institutions’ use of the Company’s application software prompts the Company to provide the services related to the website and the other training and support.<sup>16</sup> Additionally, the Financial Institutions’ use of the application software requires coordination between the Financial Institutions’ and the Company’s hardware and software. The purpose of the Financial Institutions’ use of the Company’s application software is to offer the Financial Institutions’ customers, the Account Holders, online banking services. The Financial Institutions, not the Company, provide technical support to the Account Holders using the Financial Institutions’ online banking.<sup>17</sup>

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<sup>16</sup> The facts presented about the Company’s services of set up, instruction, training, and support are insufficient to determine whether the charges for these services are subject to Utah sales and use tax. If you want more direction about this area, you may contact the Taxpayer Services Division, Technical Research Unit, using the contact information at the end of footnote 1.

<sup>17</sup> You discussed the Company’s proprietary platform. In the sales of the Offerings, the Company is not selling the Financial Institutions the use of the Company’s proprietary platform. Instead the Company is using the Company’s proprietary platform to provide the Offerings to the Financial Institutions. In PLR 13-003, currently available at <http://tax.utah.gov/commission/ruling/13-003.pdf>, the seller sold an “offering,” which was the online use of the seller’s software. For that ruling, the Commission explains that the seller was not selling to its customers the use of the seller’s hardware.

Because the essence of the transaction is the sale of the use of the Company's application software, such sales are subject to tax under § 59-12-103(1)(a), (1)(k), and (1)(l) if the transactions are made "within the state" according to § 59-12-211(12).

**C. The Analysis Found in Private Letter Ruling 10-012 ("PLR 10-012"), Involving Data Processing and Information Services, Does Not Apply to the Transaction You Presented for this Private Letter Ruling.**

The Company's sales of the Offerings are distinguishable from the sales transaction presented in PLR 10-012.<sup>18</sup> For background, in PLR 10-012 the seller sold customers online access to a database of information that the seller compiled. The customers used the seller's software to access that database. The Commission found the primary object of the transaction was the use of the seller's database, not the use of the seller's software. The Commission ruled that the seller's sales were not subject to Utah sales taxes because the sale of the use of a database is not listed in § 59-12-103 as a taxable transaction. The Commission then explained that the use of the seller's database was a "data processing and information service," which service is not included in the list of taxable services found in § 59-12-103. For the current private letter ruling, the Company's sales of the Offerings to Financial Institutions are distinguishable. First, the primary object of the Company's transaction is the use of the Company's application software, not use of any database compiled by the Company. The Company does not compile then sell the use of any database. Second, the Company's sales of use of its software are taxable under § 59-12-103(1)(a), (1)(k), and (1)(l).

**D. The Sales of the Offerings are Not Exempt Under § 59-12-104(78), as Amounts Paid or Charged to Access a Database.**

Section 59-12-104(78) exempts "[A]mounts paid or charged to access a database." The Financial Institutions are paying the Company to use the Company's application software; they are not paying to access the Company's database. As explained previously, the Company does not compile then sell access to any database. Thus, the Company's sales of the Offerings do not qualify for the exemption found in § 59-12-104(78).

**V. Conclusion**

As explained in this letter, this private letter ruling does not cover the Company's sales of the Offerings to Financial Institutions that are federal credit unions. The Company's sales of the Offerings to Financial Institutions located in Utah, that are not federal credit unions, are taxable under § 59-12-103(1)(a), (1)(k), and (1)(l). The sales of the Offerings are not sales of nontaxable services and are not exempt under § 59-12-104(78), as amounts charged to access a database.

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<sup>18</sup> PLR 10-012 is currently available online at <http://www.tax.utah.gov/commission/ruling/10-012.pdf>.

The Tax Commission's conclusions are based on the facts as you described them and the Utah law currently in effect. Should the facts be different or if the law were to change, a different conclusion may be warranted. If you feel we have misunderstood the facts as you have presented them, you have additional facts that may be relevant, or you have any other questions, please feel free to contact the Commission.

Additionally, you may also appeal the private letter ruling in the following two ways.

First, you may file a petition for declaratory order, which would serve to challenge the Commission's interpretation of statutory language or authority under a statute. This petition must be in written form, and submitted within thirty (30) days after the date of this private letter ruling. You may submit your petition by any of the means given below. **Failure to submit your petition within the 30-day time frame could forfeit your appeal rights.** Declaratory orders are discussed in Utah Administrative Code R861-1A-34 C.2., available online at <http://tax.utah.gov/commission/effective/r861-01a-034.pdf>, and in Utah Administrative Code R861-1A-31, available online at <http://tax.utah.gov/commission/effective/r861-01a-031.pdf>.

Second, you may file a petition for redetermination of agency action if your private letter ruling leads to an audit assessment, a denial of a claim, or some other agency action at a division level. This petition must be written and may use form TC-738, available online at <http://tax.utah.gov/forms/current/tc-738.pdf>. Your petition must be submitted by any of the means given below, within thirty (30) days, generally, of the date of the notice of agency action that describes the agency action you are challenging.

You may access general information about Tax Commission Appeals online at <http://tax.utah.gov/commission-office/appeals>. You may file an appeal through any of the means provided below:

- **Best way**—by email: [taxappeals@utah.gov](mailto:taxappeals@utah.gov)
- By mail: Tax Appeals  
USTC  
210 North 1950 West  
Salt Lake City, UT 84134
- By fax: 801-297-3919

For the Commission,

Rebecca L. Rockwell  
Commissioner

RLR/aln  
15-005