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REGULAR SESSION, 2010

OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

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ENROLLED

Senate Bill No. 461

(BY SENATORS HELMICK, McCABE AND MINARD)

[Passed March 10, 2010; in effect ninety days from passage.]

SB 461

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CLERK OF COURTS
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AN ACT to amend and reenact §11-15B-2, §11-15B-2a, §11-15B-11, §11-15B-17, §11-15B-25, §11-15B-26 and §11-15B-32 of the Code of West Virginia, 1931, as amended, all relating to the administration of sales and use tax generally; striking certain definitions; incorporating changes made by the governing board in reference to the agreement; adding a classification for registration of seller making no sales in state; defining “advertising and promotional direct mail” and “other direct mail”; providing duties of purchasers and sellers of direct mail; directing the tax commissioner to provide notice and simplified electronic returns; allowing for electronic payment of taxes due; identifying required filers; providing for the loss of exemption for failing to file; adopting a standardized transmission process; authorizing the tax commissioner to establish liability amount of taxes; and providing new effective dates.

Be it enacted by the Legislature of West Virginia:

That §11-15B-2, §11-15B-2a, §11-15B-11, §11-15B-17, §11-15B-25, §11-15B-26 and §11-15B-32 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 15B. SALES AND USE TAX ADMINISTRATION.

§11-15B-2. Definitions.

1 (a) *General.* – When used in this article and articles
2 fifteen and fifteen-a of this chapter, words defined in
3 subsection (b) of this section shall have the meanings
4 ascribed to them in this section, except where a different
5 meaning is distinctly expressed or the context in which the
6 term is used clearly indicates that a different meaning is
7 intended by the Legislature.

8 (b) *Terms defined.* –

9 (1) “Agent” means a person appointed by a seller to
10 represent the seller before the member states.

11 (2) “Agreement” means the Streamlined Sales and Use
12 Tax Agreement as defined in section two-a of this article.

13 (3) “Alcoholic beverages” means beverages that are
14 suitable for human consumption and contain one half of
15 one percent or more of alcohol by volume.

16 (4) “Bundled transaction” means the retail sale of two or
17 more products, except real property and services to real
18 property, where: (i) The products are otherwise distinct
19 and identifiable; and (ii) the products are sold for one
20 nonitemized price. A “bundled transaction” does not
21 include the sale of any products in which the “sales price”
22 varies, or is negotiable, based on the selection by the
23 purchaser of the products included in the transaction.

24 (A) “Distinct and identifiable products” does not
25 include:

26 (i) Packaging such as containers, boxes, sacks, bags and
27 bottles or other materials such as wrapping, labels, tags
28 and instruction guides that accompany the “retail sale” of
29 the products and are incidental or immaterial to the
30 “retail sale” thereof. Examples of packaging that are

31 incidental or immaterial include grocery sacks, shoe boxes,
32 dry cleaning garment bags and express delivery envelopes
33 and boxes;

34 (ii) A product provided free of charge with the required
35 purchase of another product. A product is “provided free
36 of charge” if the “sales price” of the product purchased
37 does not vary depending on the inclusion of the product
38 “provided free of charge”; or

39 (iii) Items included in the member state’s definition of
40 “sales price” as defined in this section.

41 (B) The term “one nonitemized price” does not include
42 a price that is separately identified by product on binding
43 sales or other supporting sales-related documentation
44 made available to the customer in paper or electronic form
45 including, but not limited to, an invoice, bill of sale,
46 receipt, contract, service agreement, lease agreement,
47 periodic notice of rates and services, rate card or price list.

48 (C) A transaction that otherwise meets the definition of
49 a “bundled transaction”, as defined in this subdivision, is
50 not a “bundled transaction” if it is:

51 (i) The “retail sale” of tangible personal property and a
52 service where the tangible personal property is essential to
53 the use of the service and is provided exclusively in
54 connection with the service and the true object of the
55 transaction is the service; or

56 (ii) The “retail sale” of services where one service is
57 provided that is essential to the use or receipt of a second
58 service and the first service is provided exclusively in
59 connection with the second service and the true object of
60 the transaction is the second service; or

61 (iii) A transaction that includes taxable products and
62 nontaxable products and the “purchase price” or “sales
63 price” of the taxable products is de minimis;

64 (I) “De minimis” means the seller’s “purchase price” or
65 “sales price” of the taxable products is ten percent or less
66 of the total “purchase price” or “sales price” of the
67 bundled products;

68 (II) Sellers shall use either the “purchase price” or the
69 “sales price” of the products to determine if the taxable
70 products are de minimis. Sellers may not use a combina-
71 tion of the “purchase price” and “sales price” of the
72 products to determine if the taxable products are de
73 minimis;

74 (III) Sellers shall use the full term of a service contract
75 to determine if the taxable products are de minimis; or

76 (iv) A transaction that includes products taxable at the
77 general rate of tax and food or food ingredients taxable at
78 a lower rate of tax and the “purchase price” or “sales
79 price” of the products taxable at the general sales tax rate
80 is de minimis. For purposes of this subparagraph, the term
81 “de minimis” has the same meaning as ascribed to it under
82 subparagraph (iii) of this paragraph;

83 (v) The “retail sale” of exempt tangible personal prop-
84 erty, or food and food ingredients taxable at a lower rate
85 of tax, and tangible personal property taxable at the
86 general rate of tax where:

87 (I) The transaction includes “food and food ingredients”,
88 “drugs”, “durable medical equipment”, “mobility-enhanc-
89 ing equipment”, “over-the-counter drugs”, “prosthetic
90 devices” or medical supplies, all as defined in this article;
91 and

92 (II) Where the seller’s “purchase price” or “sales price”
93 of the taxable tangible personal property taxable at the
94 general rate of tax is fifty percent or less of the total
95 “purchase price” or “sales price” of the bundled tangible
96 personal property. Sellers may not use a combination of

97 the “purchase price” and “sales price” of the tangible
98 personal property when making the fifty percent determi-
99 nation for a transaction.

100 (5) “Candy” means a preparation of sugar, honey or
101 other natural or artificial sweeteners in combination with
102 chocolate, fruits, nuts or other ingredients or flavorings in
103 the form of bars, drops or pieces. “Candy” shall not
104 include any preparation containing flour and shall require
105 no refrigeration.

106 (6) “Clothing” means all human wearing apparel suit-
107 able for general use. The following list contains examples
108 and is not intended to be an all-inclusive list.

109 (A) “Clothing” shall include:

110 (i) Aprons, household and shop;

111 (ii) Athletic supporters;

112 (iii) Baby receiving blankets;

113 (iv) Bathing suits and caps;

114 (v) Beach capes and coats;

115 (vi) Belts and suspenders;

116 (vii) Boots;

117 (viii) Coats and jackets;

118 (ix) Costumes;

119 (x) Diapers, children and adult, including disposable
120 diapers;

121 (xi) Ear muffs;

122 (xii) Footlets;

123 (xiii) Formal wear;

- 124 (xiv) Garters and garter belts;
- 125 (xv) Girdles;
- 126 (xvi) Gloves and mittens for general use;
- 127 (xvii) Hats and caps;
- 128 (xviii) Hosiery;
- 129 (xix) Insoles for shoes;
- 130 (xx) Lab coats;
- 131 (xxi) Neckties;
- 132 (xxii) Overshoes;
- 133 (xxiii) Pantyhose;
- 134 (xxiv) Rainwear;
- 135 (xxv) Rubber pants;
- 136 (xxvi) Sandals;
- 137 (xxvii) Scarves;
- 138 (xxviii) Shoes and shoe laces;
- 139 (xxix) Slippers;
- 140 (xxx) Sneakers;
- 141 (xxxii) Socks and stockings;
- 142 (xxxiii) Steel-toed shoes;
- 143 (xxxiv) Underwear;
- 144 (xxxv) Uniforms, athletic and nonathletic; and
- 145 (xxxvi) Wedding apparel.
- 146 (B) "Clothing" shall not include:

- 147 (I) Belt buckles sold separately;
- 148 (ii) Costume masks sold separately;
- 149 (iii) Patches and emblems sold separately;
- 150 (iv) Sewing equipment and supplies, including, but not
151 limited to, knitting needles, patterns, pins, scissors, sewing
152 machines, sewing needles, tape measures and thimbles;
153 and
- 154 (v) Sewing materials that become part of “clothing”
155 including, but not limited to, buttons, fabric, lace, thread,
156 yarn and zippers.
- 157 (7) “Clothing accessories or equipment” means inciden-
158 tal items worn on the person or in conjunction with
159 “clothing”. “Clothing accessories or equipment” are
160 mutually exclusive of and may be taxed differently than
161 apparel within the definition of “clothing”, “sport or
162 recreational equipment” and “protective equipment”. The
163 following list contains examples and is not intended to be
164 an all-inclusive list. “Clothing accessories or equipment”
165 shall include:
- 166 (A) Briefcases;
- 167 (B) Cosmetics;
- 168 (C) Hair notions, including, but not limited to, barrettes,
169 hair bows and hair nets;
- 170 (D) Handbags;
- 171 (E) Handkerchiefs;
- 172 (F) Jewelry;
- 173 (G) Sunglasses, nonprescription;
- 174 (H) Umbrellas;
- 175 (I) Wallets;

176 (J) Watches; and

177 (K) Wigs and hair pieces.

178 (8) “Certified automated system” or “CAS” means
179 software certified under the agreement to calculate the tax
180 imposed by each jurisdiction on a transaction, determine
181 the amount of tax to remit to the appropriate state and
182 maintain a record of the transaction.

183 (9) “Certified service provider” or “CSP” means an
184 agent certified under the agreement to perform all of the
185 seller’s sales and use tax functions other than the seller’s
186 obligation to remit tax on its own purchases.

187 (10) “Computer” means an electronic device that accepts
188 information in digital or similar form and manipulates the
189 information for a result based on a sequence of instruc-
190 tions.

191 (11) “Computer software” means a set of coded instruc-
192 tions designed to cause a “computer” or automatic data
193 processing equipment to perform a task.

194 (12) “Delivery charges” means charges by the seller of
195 personal property or services for preparation and delivery
196 to a location designated by the purchaser of personal
197 property or services including, but not limited to, trans-
198 portation, shipping, postage, handling, crating and
199 packing.

200 (13) “Dietary supplement” means any product, other
201 than “tobacco”, intended to supplement the diet that:

202 (A) Contains one or more of the following dietary
203 ingredients:

204 (i) A vitamin;

205 (ii) A mineral;

- 206 (iii) An herb or other botanical;
- 207 (iv) An amino acid;
- 208 (v) A dietary substance for use by humans to supplement
209 the diet by increasing the total dietary intake; or
- 210 (vi) A concentrate, metabolite, constituent, extract or
211 combination of any ingredient described in subparagraph
212 (i) through (v), inclusive, of this paragraph;
- 213 (B) And is intended for ingestion in tablet, capsule,
214 powder, softgel, gelcap or liquid form, or if not intended
215 for ingestion in such a form, is not represented as conven-
216 tional food and is not represented for use as a sole item of
217 a meal or of the diet; and
- 218 (C) Is required to be labeled as a dietary supplement,
219 identifiable by the “Supplemental Facts” box found on the
220 label as required pursuant to 21 CFR §101.36 or in any
221 successor section of the Code of Federal Regulations.
- 222 (14) “Direct mail” means printed material delivered or
223 distributed by United States mail or other delivery service
224 to a mass audience or to addressees on a mailing list
225 provided by the purchaser or at the direction of the
226 purchaser when the cost of the items are not billed directly
227 to the recipients. “Direct mail” includes tangible personal
228 property supplied directly or indirectly by the purchaser
229 to the direct mail seller for inclusion in the package
230 containing the printed material. “Direct mail” does not
231 include multiple items of printed material delivered to a
232 single address.
- 233 (15) “Drug” means a compound, substance or prepara-
234 tion, and any component of a compound, substance or
235 preparation, other than food and food ingredients, dietary
236 supplements or alcoholic beverages:
- 237 (A) Recognized in the official United States Pharmaco-
238 poeia, official Homeopathic Pharmacopoeia of the United

239 States or official National Formulary, and supplement to
240 any of them;

241 (B) Intended for use in the diagnosis, cure, mitigation,
242 treatment or prevention of disease; or

243 (C) Intended to affect the structure or any function of
244 the body. The amendment to this subdivision enacted
245 during the 2009 regular legislative session shall apply to
246 sales made after July 1, 2009.

247 (16) “Durable medical equipment” means equipment,
248 including repair and replacement parts for the equipment,
249 but does not include “mobility-enhancing equipment”,
250 which:

251 (A) Can withstand repeated use;

252 (B) Is primarily and customarily used to serve a medical
253 purpose;

254 (C) Generally is not useful to a person in the absence of
255 illness or injury; and

256 (D) Is not worn in or on the body.

257 (17) “Electronic” means relating to technology having
258 electrical, digital, magnetic, wireless, optical, electromag-
259 netic or similar capabilities.

260 (18) “Eligible property” means an item of a type, such as
261 clothing, that qualifies for a sales tax holiday exemption
262 in this state.

263 (19) “Energy Star qualified product” means a product
264 that meets the energy efficient guidelines set by the United
265 States Environmental Protection Agency and the United
266 States Department of Energy that are authorized to carry
267 the Energy Star label. Covered products are those listed
268 at www.energystar.gov or successor address.

269 (20) “Entity-based exemption” means an exemption
270 based on who purchases the product or service or who sells
271 the product or service. An exemption that is available to
272 all individuals shall not be considered an entity-based
273 exemption.

274 (21) “Food and food ingredients” means substances,
275 whether in liquid, concentrated, solid, frozen, dried or
276 dehydrated form, that are sold for ingestion or chewing by
277 humans and are consumed for their taste or nutritional
278 value. “Food and food ingredients” does not include
279 alcoholic beverages, prepared food or tobacco.

280 (22) “Food sold through vending machines” means food
281 dispensed from a machine or other mechanical device that
282 accepts payment.

283 (23) “Fur clothing” means “clothing” that is required to
284 be labeled as a fur product under the Federal Fur Products
285 Labeling Act (15 U.S.C. §69) and the value of the fur
286 components in the product is more than three times the
287 value of the next most valuable tangible component. “Fur
288 clothing” is human-wearing apparel suitable for general
289 use but may be taxed differently from “clothing”. For the
290 purposes of the definition of “fur clothing”, the term “fur”
291 means any animal skin or part thereof with hair, fleece or
292 fur fibers attached thereto, either in its raw or processed
293 state, but shall not include such skins that have been
294 converted into leather or suede, or which in processing the
295 hair, fleece or fur fiber has been completely removed.

296 (24) “Governing board” means the governing board of
297 the Streamlined Sales and Use Tax Agreement.

298 (25) “Grooming and hygiene products” are soaps and
299 cleaning solutions, shampoo, toothpaste, mouthwash,
300 antiperspirants and sun tan lotions and screens, regardless
301 of whether the items meet the definition of “over-the-
302 counter drugs”.

303 (26) “Includes” and “including” when used in a defini-
304 tion contained in this article is not considered to exclude
305 other things otherwise within the meaning of the term
306 being defined.

307 (27) “Layaway sale” means a transaction in which
308 property is set aside for future delivery to a customer who
309 makes a deposit, agrees to pay the balance of the purchase
310 price over a period of time and, at the end of the payment
311 period, receives the property. An order is accepted for
312 layaway by the seller when the seller removes the property
313 from normal inventory or clearly identifies the property as
314 sold to the purchaser.

315 (28) “Lease” includes rental, hire and license. “Lease”
316 means any transfer of possession or control of tangible
317 personal property for a fixed or indeterminate term for
318 consideration. A lease or rental may include future
319 options to purchase or extend.

320 (A) “Lease” does not include:

321 (i) A transfer of possession or control of property under
322 a security agreement or deferred payment plan that
323 requires the transfer of title upon completion of the
324 required payments;

325 (ii) A transfer or possession or control of property under
326 an agreement that requires the transfer of title upon
327 completion of required payments and payment of an
328 option price does not exceed the greater of \$100 or one
329 percent of the total required payments; or

330 (iii) Providing tangible personal property along with an
331 operator for a fixed or indeterminate period of time. A
332 condition of this exclusion is that the operator is necessary
333 for the equipment to perform as designed. For the purpose
334 of this subparagraph, an operator must do more than
335 maintain, inspect or set-up the tangible personal property.

336 (iv) “Lease” or “rental” includes agreements covering
337 motor vehicles and trailers where the amount of consider-
338 ation may be increased or decreased by reference to the
339 amount realized upon sale or disposition of the property as
340 defined in 26 U.S.C. 7701(h)(1).

341 (B) This definition shall be used for sales and use tax
342 purposes regardless if a transaction is characterized as a
343 lease or rental under generally accepted accounting
344 principles, the Internal Revenue Code, the Uniform
345 Commercial Code or other provisions of federal, state or
346 local law.

347 (29) “Load and leave” means delivery to the purchaser
348 by use of a tangible storage media where the tangible
349 storage media is not physically transferred to the pur-
350 chaser.

351 (30) “Mobility-enhancing equipment” means equipment,
352 including repair and replacement parts to the equipment,
353 but does not include “durable medical equipment”, which:

354 (A) Is primarily and customarily used to provide or
355 increase the ability to move from one place to another and
356 which is appropriate for use either in a home or a motor
357 vehicle;

358 (B) Is not generally used by persons with normal mobil-
359 ity; and

360 (C) Does not include any motor vehicle or equipment on
361 a motor vehicle normally provided by a motor vehicle
362 manufacturer.

363 (31) “Model I seller” means a seller that has selected a
364 certified service provider as its agent to perform all the
365 seller’s sales and use tax functions, other than the seller’s
366 obligation to remit tax on its own purchases.

367 (32) “Model II seller” means a seller that has selected a
368 certified automated system to perform part of its sales and

369 use tax functions, but retains responsibility for remitting
370 the tax.

371 (33) “Model III seller” means a seller that has sales in at
372 least five member states, has total annual sales revenue of
373 at least \$500 million, has a proprietary system that
374 calculates the amount of tax due each jurisdiction and has
375 entered into a performance agreement with the member
376 states that establishes a tax performance standard for the
377 seller. As used in this definition, a seller includes an
378 affiliated group of sellers using the same proprietary
379 system.

380 (34) “Over-the-counter drug” means a drug that contains
381 a label that identifies the product as a drug as required by
382 21 CFR §201.66. The “over-the-counter drug” label
383 includes:

384 (A) A “drug facts” panel; or

385 (B) A statement of the “active ingredient(s)” with a list
386 of those ingredients contained in the compound, substance
387 or preparation.

388 (35) “Person” means an individual, trust, estate, fidu-
389 ciary, partnership, limited liability company, limited
390 liability partnership, corporation or any other legal entity.

391 (36) “Personal service” includes those:

392 (A) Compensated by the payment of wages in the
393 ordinary course of employment; and

394 (B) Rendered to the person of an individual without, at
395 the same time, selling tangible personal property, such as
396 nursing, barbering, manicuring and similar services.

397 (37) (A) “Prepared food” means:

398 (i) Food sold in a heated state or heated by the seller;

399 (ii) Two or more food ingredients mixed or combined by
400 the seller for sale as a single item; or

401 (iii) Food sold with eating utensils provided by the seller,
402 including plates, knives, forks, spoons, glasses, cups,
403 napkins or straws. A plate does not include a container or
404 packaging used to transport the food.

405 (B) “Prepared food” in subparagraph (ii), paragraph (A)
406 of this subdivision does not include food that is only cut,
407 repackaged or pasteurized by the seller, and eggs, fish,
408 meat, poultry and foods containing these raw animal foods
409 requiring cooking by the consumer as recommended by the
410 Food and Drug Administration in Chapter 3, Part 401.11
411 of its Food Code of 2001 so as to prevent food-borne
412 illnesses.

413 (C) Additionally, “prepared food” as defined in this
414 subdivision does not include:

415 (i) Food sold by a seller whose proper primary NAICS
416 classification is manufacturing in Sector 311, except
417 Subsection 3118 (bakeries);

418 (ii) Food sold in an unheated state by weight or volume
419 as a single item; or

420 (iii) Bakery items, including bread, rolls, buns, biscuits,
421 bagels, croissants, pastries, donuts, danish, cakes, tortes,
422 pies, tarts, muffins, bars, cookies, tortillas.

423 (38) “Prescription” means an order, formula or recipe
424 issued in any form of oral, written, electronic or other
425 means of transmission by a duly licensed practitioner
426 authorized by the laws of this state to issue prescriptions.

427 (39) “Prewritten computer software” means “computer
428 software”, including prewritten upgrades, which is not
429 designed and developed by the author or other creator to
430 the specifications of a specific purchaser.

431 (A) The combining of two or more prewritten computer
432 software programs or prewritten portions thereof does not
433 cause the combination to be other than prewritten com-
434 puter software.

435 (B) “Prewritten computer software” includes software
436 designed and developed by the author or other creator to
437 the specifications of a specific purchaser when it is sold to
438 a person other than the specific purchaser. Where a
439 person modifies or enhances computer software of which
440 the person is not the author or creator, the person is
441 considered to be the author or creator only of the person’s
442 modifications or enhancements.

443 (C) “Prewritten computer software” or a prewritten
444 portion thereof that is modified or enhanced to any degree,
445 where the modification or enhancement is designed and
446 developed to the specifications of a specific purchaser,
447 remains prewritten computer software. However, where
448 there is a reasonable, separately stated charge or an
449 invoice or other statement of the price given to the pur-
450 chaser for the modification or enhancement, the modifica-
451 tion or enhancement does not constitute prewritten
452 computer software.

453 (40) “Product-based exemption” means an exemption
454 based on the description of the product or service and not
455 based on who purchases the product or service or how the
456 purchaser intends to use the product or service.

457 (41) “Prosthetic device” means a replacement, corrective
458 or supportive device, including repair and replacement
459 parts for the device worn on or in the body, to:

460 (A) Artificially replace a missing portion of the body;

461 (B) Prevent or correct physical deformity or malfunction
462 of the body; or

463 (C) Support a weak or deformed portion of the body.

464 (42) "Protective equipment" means items for human
465 wear and designed as protection of the wearer against
466 injury or disease or as protections against damage or
467 injury of other persons or property but not suitable for
468 general use.

469 (43) "Purchase price" means the measure subject to the
470 tax imposed by article fifteen or fifteen-a of this chapter
471 and has the same meaning as sales price.

472 (44) "Purchaser" means a person to whom a sale of
473 personal property is made or to whom a service is fur-
474 nished.

475 (45) "Retail sale" or "sale at retail" means:

476 (A) Any sale, lease or rental for any purpose other than
477 for resale as tangible personal property, sublease or
478 subrent; and

479 (B) Any sale of a service other than a service purchased
480 for resale.

481 (46) (A) "Sales price" means the measure subject to the
482 tax levied under article fifteen or fifteen-a of this chapter
483 and includes the total amount of consideration, including
484 cash, credit, property and services, for which personal
485 property or services are sold, leased or rented, valued in
486 money, whether received in money or otherwise, without
487 any deduction for the following:

488 (i) The seller's cost of the property sold;

489 (ii) The cost of materials used, labor or service cost,
490 interest, losses, all costs of transportation to the seller, all
491 taxes imposed on the seller and any other expense of the
492 seller;

493 (iii) Charges by the seller for any services necessary to
494 complete the sale, other than delivery and installation
495 charges;

496 (iv) Delivery charges; and

497 (v) Installation charges.

498 (B) "Sales price" does not include:

499 (i) Discounts, including cash, term or coupons that are
500 not reimbursed by a third party that are allowed by a
501 seller and taken by a purchaser on a sale;

502 (ii) Interest, financing and carrying charges from credit
503 extended on the sale of personal property, goods or
504 services, if the amount is separately stated on the invoice,
505 bill of sale or similar document given to the purchaser; or

506 (iii) Any taxes legally imposed directly on the consumer
507 that are separately stated on the invoice, bill of sale or
508 similar document given to the purchaser.

509 (C) "Sales price" shall include consideration received by
510 the seller from third parties if:

511 (i) The seller actually receives consideration from a party
512 other than the purchaser and the consideration is directly
513 related to a price reduction or discount on the sale;

514 (ii) The seller has an obligation to pass the price reduc-
515 tion or discount through to the purchaser;

516 (iii) The amount of the consideration attributable to the
517 sale is fixed and determinable by the seller at the time of
518 the sale of the item to the purchaser; and

519 (iv) One of the following criteria is met:

520 (I) The purchaser presents a coupon, certificate or other
521 documentation to the seller to claim a price reduction or
522 discount where the coupon, certificate or documentation
523 is authorized, distributed or granted by a third party with
524 the understanding that the third party will reimburse any
525 seller to whom the coupon, certificate or documentation is
526 presented;

527 (II) The purchaser identifies himself or herself to the
528 seller as a member of a group or organization entitled to a
529 price reduction or discount (a “preferred customer” card
530 that is available to any patron does not constitute mem-
531 bership in such a group); or

532 (III) The price reduction or discount is identified as a
533 third-party price reduction or discount on the invoice
534 received by the purchaser or on a coupon, certificate or
535 other documentation presented by the purchaser.

536 (47) “Sales tax” means the tax levied under article
537 fifteen of this chapter.

538 (48) “School art supply” means an item commonly used
539 by a student in a course of study for artwork. The term is
540 mutually exclusive of the terms “school supply”, “school
541 instructional material” and “school computer supply” and
542 may be taxed differently. The following is an all-inclusive
543 list:

544 (A) Clay and glazes;

545 (B) Paints; acrylic, tempora and oil;

546 (C) Paintbrushes for artwork;

547 (D) Sketch and drawing pads; and

548 (E) Watercolors.

549 (49) “School instructional material” means written
550 material commonly used by a student in a course of study
551 as a reference and to learn the subject being taught. The
552 term is mutually exclusive of the terms “school supply”,
553 “school art supply” and “school computer supply” and
554 may be taxed differently. The following is an all-inclusive
555 list:

556 (A) Reference books;

557 (B) Reference maps and globes;

558 (C) Textbooks; and

559 (D) Workbooks.

560 (50) "School computer supply" means an item commonly
561 used by a student in a course of study in which a computer
562 is used. The term is mutually exclusive of the terms
563 "school supply", "school art supply" and "school instruc-
564 tional material" and may be taxed differently. The
565 following is an all-inclusive list:

566 (A) Computer storage media; diskettes, compact disks;

567 (B) Handheld electronic schedulers, except devices that
568 are cellular phones;

569 (C) Personal digital assistants, except devices that are
570 cellular phones;

571 (D) Computer printers; and

572 (E) Printer supplies for computers; printer paper, printer
573 ink.

574 (51) "School supply" means an item commonly used by
575 a student in a course of study. The term is mutually
576 exclusive of the terms "school art supply", "school in-
577 structional material" and "school computer supply" and
578 may be taxed differently. The following is an all-inclusive
579 list of school supplies:

580 (A) Binders;

581 (B) Book bags;

582 (C) Calculators;

583 (D) Cellophane tape;

584 (E) Blackboard chalk;

- 585 (F) Compasses;
- 586 (G) Composition books;
- 587 (H) Crayons;
- 588 (I) Erasers;
- 589 (J) Folders; expandable, pocket, plastic and manila;
- 590 (K) Glue, paste and paste sticks;
- 591 (L) Highlighters;
- 592 (M) Index cards;
- 593 (N) Index card boxes;
- 594 (O) Legal pads;
- 595 (P) Lunch boxes;
- 596 (Q) Markers;
- 597 (R) Notebooks;
- 598 (S) Paper; loose-leaf ruled notebook paper, copy paper,
599 graph paper, tracing paper, manila paper, colored paper,
600 poster board and construction paper;
- 601 (T) Pencil boxes and other school supply boxes;
- 602 (U) Pencil sharpeners;
- 603 (V) Pencils;
- 604 (W) Pens;
- 605 (X) Protractors;
- 606 (Y) Rulers;
- 607 (Z) Scissors; and
- 608 (AA) Writing tablets.

609 (52) "Seller" means any person making sales, leases or
610 rentals of personal property or services.

611 (53) "Service" or "selected service" includes all
612 nonprofessional activities engaged in for other persons for
613 a consideration which involve the rendering of a service as
614 distinguished from the sale of tangible personal property,
615 but does not include contracting, personal services,
616 services rendered by an employee to his or her employer,
617 any service rendered for resale or any service furnished by
618 a business that is subject to the control of the Public
619 Service Commission when the service or the manner in
620 which it is delivered is subject to regulation by the Public
621 Service Commission of this state. The term "service" or
622 "selected service" does not include payments received by
623 a vendor of tangible personal property as an incentive to
624 sell a greater volume of such tangible personal property
625 under a manufacturer's, distributor's or other third-party's
626 marketing support program, sales incentive program,
627 cooperative advertising agreement or similar type of
628 program or agreement and these payments are not consid-
629 ered to be payments for a "service" or "selected service"
630 rendered, even though the vendor may engage in attendant
631 or ancillary activities associated with the sales of tangible
632 personal property as required under the programs or
633 agreements.

634 (54) "Soft drink" means nonalcoholic beverages that
635 contain natural or artificial sweeteners. "Soft drinks" do
636 not include beverages that contain milk or milk products,
637 soy, rice or similar milk substitutes or greater than fifty
638 percent of vegetable or fruit juice by volume.

639 (55) "Sport or recreational equipment" means items
640 designed for human use and worn in conjunction with an
641 athletic or recreational activity that are not suitable for
642 general use. "Sport or recreational equipment" are
643 mutually exclusive of and may be taxed differently than

644 apparel within the definition of “clothing”, “clothing
645 accessories or equipment” and “protective equipment”.
646 The following list contains examples and is not intended
647 to be an all-inclusive list. “Sport or recreational equip-
648 ment” shall include:

649 (A) Ballet and tap shoes;

650 (B) Cleated or spiked athletic shoes;

651 (C) Gloves, including, but not limited to, baseball,
652 bowling, boxing, hockey and golf;

653 (D) Goggles;

654 (E) Hand and elbow guards;

655 (F) Life preservers and vests;

656 (G) Mouth guards;

657 (H) Roller and ice skates;

658 (I) Shin guards;

659 (J) Shoulder pads;

660 (K) Ski boots;

661 (L) Waders; and

662 (M) Wetsuits and fins.

663 (56) “State” means any state of the United States, the
664 District of Columbia and the Commonwealth of Puerto
665 Rico.

666 (57) “Tangible personal property” means personal
667 property that can be seen, weighed, measured, felt or
668 touched or that is in any manner perceptible to the senses.
669 “Tangible personal property” includes, but is not limited
670 to, electricity, steam, water, gas and prewritten computer
671 software.

672 (58) "Tax" includes all taxes levied under articles fifteen
673 and fifteen-a of this chapter and additions to tax, interest
674 and penalties levied under article ten of this chapter.

675 (59) "Tax Commissioner" means the State Tax Commis-
676 sioner or his or her delegate. The term "delegate" in the
677 phrase "or his or her delegate", when used in reference to
678 the Tax Commissioner, means any officer or employee of
679 the State Tax Division duly authorized by the Tax Com-
680 missioner directly, or indirectly by one or more
681 redelegations of authority, to perform the functions
682 mentioned or described in this article or rules promulgated
683 for this article.

684 (60) "Taxpayer" means any person liable for the taxes
685 levied by articles fifteen and fifteen-a of this chapter or
686 any additions to tax penalties imposed by article ten of
687 this chapter.

688 (61) "Telecommunications service" or "telecommunica-
689 tion service" when used in this article and articles fifteen
690 and fifteen-a of this chapter shall have the same meaning
691 as that term is defined in section two-b of this article.

692 (62) "Tobacco" means cigarettes, cigars, chewing or pipe
693 tobacco or any other item that contains tobacco.

694 (63) "Use tax" means the tax levied under article fifteen-
695 a of this chapter.

696 (64) "Use-based exemption" means an exemption based
697 on a specified use of the product or service by the pur-
698 chaser.

699 (65) "Vendor" means any person furnishing services
700 taxed by article fifteen or fifteen-a of this chapter or
701 making sales of tangible personal property or custom
702 software. "Vendor" and "seller" are used interchangeably
703 in this article and in articles fifteen and fifteen-a of this
704 chapter.

705 (c) *Additional definitions.* – Other terms used in this
706 article are defined in articles fifteen and fifteen-a of this
707 chapter, which definitions are incorporated by reference
708 into this article. Additionally, other sections of this article
709 may define terms primarily used in the section in which
710 the term is defined.

§11-15B-2a. Streamlined Sales and Use Tax Agreement defined.

1 As used in this article and articles fifteen and fifteen-a
2 of this chapter, the term “Streamlined Sales and Use Tax
3 Agreement” or “agreement” means the agreement adopted
4 November 12, 2002, by states that enacted authority to
5 engage in multistate discussions similar to that provided
6 in section four of this article, except when the context in
7 which the term is used clearly indicates that a different
8 meaning is intended by the Legislature. “Agreement”
9 includes amendments to the agreement adopted by the
10 implementing states in calendar years 2003, 2004, 2005,
11 2006, 2007, 2008, 2009 and amendments adopted by the
12 governing board on or before January 31, 2010, but does
13 not include any substantive changes in the agreement
14 adopted after January 31, 2010.

§11-15B-11. Seller registration.

1 (a) *General.* – A seller that registers to collect West
2 Virginia sales and use taxes using the online sales and use
3 tax registration system established under the Streamlined
4 Sales and Use Tax Agreement is not required to also
5 register under article twelve of this chapter unless the
6 seller has sufficient presence in this state that provides at
7 least the minimum contacts necessary for a Constitution-
8 ally sufficient nexus for this state to require registration
9 and payment of the registration tax under article twelve of
10 this chapter.

11 (b) *Registration of seller making no sales.* – A Model II or
12 Model III seller may elect to register as a seller that
13 anticipates making no sales if the seller had no sales in
14 West Virginia for the preceding twelve months. Such
15 election does not relieve the seller of its agreement pursu-
16 ant to subsection (a) of section twelve of this article to
17 collect taxes on all sales into this state as well as for all
18 other states participating in the agreement or its liability
19 for remitting to the proper states any taxes collected.

20 (c) A written signature from the seller is not required.

21 (d) *Registration by agent.* – A person appointed by a
22 seller to represent the seller before the states that are
23 members of the agreement may register the seller under
24 the agreement under uniform procedures approved by the
25 governing board. The appointment of an agent shall be in
26 writing and submitted to this state if requested by the Tax
27 Commissioner.

28 (e) *Cancellation of registration.* – A seller may cancel its
29 registration under the system at any time under uniform
30 procedures adopted by the governing board. Cancellation
31 does not relieve the seller of its liability for remitting to
32 the state any taxes collected.

33 (f) Nothing in this section shall be construed to relieve a
34 seller of any legal obligation it may have to register or any
35 obligation to collect and remit taxes for at least thirty-six
36 months and meet all other requirements for amnesty set
37 out in section thirteen of this article in order to be eligible
38 for amnesty.

39 (g) Sellers shall be registered as follows:

40 (1) Model I sellers will be automatically registered.

41 (2) Model II and Model III sellers will be automatically
42 registered but may elect to be registered as a seller which
43 anticipates making no sales in the state.

44 (h) The provisions of subsections (b) and (g) of this
45 section shall become effective on January 1, 2010, and are
46 retroactive to that date.

§11-15B-17. Direct mail sourcing.

1 (a) Notwithstanding section fifteen of this article, the
2 following provisions apply to sales of “advertising and
3 promotional direct mail:”

4 (1) A purchaser of “advertising and promotional direct
5 mail” may provide the seller with either:

6 (A) A direct pay permit;

7 (B) An agreement certificate of exemption claiming
8 “direct mail” (or other written statement approved,
9 authorized or accepted by the state); or

10 (C) Information showing the jurisdictions to which the
11 “advertising and promotional direct mail” is to be deliv-
12 ered to recipients.

13 (2) If the purchaser provides the permit, certificate or
14 statement referred to in paragraph (A) or (B) of subdivi-
15 sion (1) of this subsection, the seller, in the absence of bad
16 faith, is relieved of all obligations to collect, pay, or remit
17 any tax on any transaction involving “advertising and
18 promotional direct mail” to which the permit, certificate
19 or statement applies. The purchaser shall source the sale
20 to the jurisdictions to which the “advertising and promo-
21 tional direct mail” is to be delivered to the recipients and
22 shall report and pay any applicable tax due.

23 (3) If the purchaser provides the seller information
24 showing the jurisdictions to which the “advertising and
25 promotional direct mail” is to be delivered to recipients,
26 the seller shall source the sale to the jurisdictions to which
27 the “advertising and promotional direct mail” is to be
28 delivered and shall collect and remit the applicable tax.

29 In the absence of bad faith, the seller is relieved of any
30 further obligation to collect any additional tax on the sale
31 of “advertising and promotional direct mail” where the
32 seller has sourced the sale according to the delivery
33 information provided by the purchaser.

34 (4) If the purchaser does not provide the seller with any
35 of the items listed in paragraphs (A), (B) or (C) of subdivi-
36 sion (1) of this subsection, the sale shall be sourced
37 according to subdivision (5) of subsection (a) of section
38 fifteen of this article.

39 (b) Notwithstanding section fifteen of this article, the
40 following provisions apply to sales of “other direct mail.”

41 (1) Except as otherwise provided in this subdivision,
42 sales of “other direct mail” are sourced in accordance with
43 subdivision (3) of subsection (a) of section fifteen of this
44 article.

45 (2) A purchaser of “other direct mail” may provide the
46 seller with either:

47 (A) A direct pay permit; or

48 (B) An Agreement certificate of exemption claiming
49 “direct mail” (or other written statement approved,
50 authorized or accepted by this state).

51 (3) If the purchaser provides the permit, certificate or
52 statement referred to in paragraph (A) or (B) of subdivi-
53 sion (2) of this subsection, the seller, in the absence of bad
54 faith, is relieved of all obligations to collect, pay or remit
55 any tax on any transaction involving “other direct mail”
56 to which the permit, certificate or statement apply.
57 Notwithstanding subdivision (1) subsection (b) of this
58 section, the sale shall be sourced to the jurisdictions to
59 which the “other direct mail” is to be delivered to the
60 recipients and the purchaser shall report and pay applica-
61 ble tax due.

62 (c) For purposes of this section:

63 (1) “Advertising and promotional direct mail” means:

64 (A) Printed material that meets the definition of “direct
65 mail,” as defined in subdivision (15), subsection (b),
66 section two of this article;

67 (B) The primary purpose of which is to attract public
68 attention to a product, business or organization, or to
69 attempt to sell, popularize or secure financial support for
70 a product, person, business or organization. As used in
71 this subsection, the word “product” means tangible
72 personal property, a product transferred electronically or
73 a service.

74 (2) “Other direct mail” means any direct mail that is not
75 “advertising and promotional direct mail” regardless of
76 whether “advertising and promotional direct mail” is
77 included in the same mailing. The term includes, but is
78 not limited to:

79 (A) Transactional direct mail that contains personal
80 information specific to the addressee including, but not
81 limited to, invoices, bills, statements of account, payroll
82 advices;

83 (B) Any legally required mailings including, but not
84 limited to, privacy notices, tax reports and stockholder
85 reports; and

86 (C) Other nonpromotional direct mail delivered to
87 existing or former shareholders, customers, employees, or
88 agents including, but not limited to, newsletters and
89 informational pieces.

90 Other direct mail does not include the development of
91 billing information or the provision of any data processing
92 service that is more than incidental.

93 (d) This section applies to a transaction characterized
94 under state law as the sale of services only if the service is
95 an integral part of the production and distribution of
96 printed material that meets the definition of “direct mail.”

97 (e) This section does not apply to any transaction that
98 includes the development of billing information or the
99 provision of any data processing service that is more than
100 incidental regardless of whether “advertising and promo-
101 tional direct mail” is included in the same mailing.

102 (1) If a transaction is a “bundled transaction” that
103 includes “advertising and promotional direct mail,” this
104 section applies only if the primary purpose of the transac-
105 tion is the sale of products or services that meet the
106 definition of “advertising and promotional direct mail.”

107 (2) Nothing in this section shall limit any purchaser’s:

108 (A) Obligation for sales or use tax to any state to which
109 the direct mail is delivered,

110 (B) Right under local, state, federal or Constitutional
111 law, to a credit for sales or use taxes legally due and paid
112 to other jurisdictions, or

113 (C) Right to a refund of sales or use taxes overpaid to
114 any jurisdiction.

115 (f) This section applies for purposes of uniformly sour-
116 cing “direct mail” transactions and does not impose
117 requirements on states regarding the taxation of products
118 that meet the definition of “direct mail” or to the applica-
119 tion of sales for resale or other exemptions.

§11-15B-25. Uniform tax returns.

1 (a) *General.* – A seller who registers with this state is
2 required to file a single sales and use tax return with the
3 Tax Commissioner for each taxing period.

4 (b) *Due date of return.* – This return shall be due on the
5 twentieth day of the month following the month in which
6 the transaction subject to tax occurred.

7 (c) *Additional information returns.* – The Tax Commis-
8 sioner shall make available to all sellers, except sellers of
9 products qualifying for exclusion from the provisions of
10 the agreement, a simplified return that is filed electroni-
11 cally.

12 (d) The Tax Commissioner may not require a seller
13 which has indicated at the time of registration that it
14 anticipates making no sales which would be sourced to
15 this state to file a return, except that the seller shall lose
16 the exemption upon making any taxable sales into this
17 state and shall file a return in the month following any
18 sale.

19 (e) After January 1, 2010, the Tax Commissioner shall
20 give notice to a seller, which has no legal requirement to
21 register in this state, of a failure to file a required return
22 and a minimum of thirty days to file thereafter prior to
23 establishing a liability amount for taxes based solely on
24 the seller's failure to timely file a return: *Provided*, That
25 the Tax Commissioner may establish a liability amount of
26 taxes based solely on the seller's failure to timely file a
27 return if such seller has a history of nonfiling or late filing.

28 (f) Nothing in this section shall prohibit the Tax Com-
29 missioner from allowing additional return options or the
30 filing of returns less frequently.

§11-15B-26. Uniform rules for remittances of funds.

1 (a) *General.* – Only one remittance is required for each
2 return except as provided in this section.

3 (b) *When electronic remittance required.* –

4 (1) All remittances from sellers under Models I, II and III
5 shall be remitted electronically after December 31, 2003.

6 (2) All remittances in payment of taxes reported on the
7 approved simplified return format shall be remitted
8 electronically.

9 (c) *Method of remittance.* – Electronic payments shall be
10 made using either the ACH credit or ACH debit method.

11 (d) *Alternative method.* – The Tax Commissioner shall
12 provide by rule, which may be an existing rule, an alterna-
13 tive method for making “same day” payments if an
14 electronic funds transfer fails.

15 (e) *Format of data accompanying remittance.* – Any data
16 that accompanies a remittance shall be formatted using
17 uniform tax type and payment type codes approved by the
18 governing board.

§11-15B-32. Effective date.

1 (a) The provisions of this article, as amended or added
2 during the regular legislative session in the year 2003,
3 shall take effect January 1, 2004, and apply to all sales
4 made on or after that date and to all returns and payments
5 due on or after that day, except as otherwise expressly
6 provided in section five of this article.

7 (b) The provisions of this article, as amended or added
8 during the second extraordinary legislative session in the
9 year 2003, shall take effect January 1, 2004, and apply to
10 all sales made on or after that date.

11 (c) The provisions of this article, as amended or added by
12 act of the Legislature in the year 2004 shall apply to all
13 sales made on or after the date of passage in the year 2004.

14 (d) The provisions of this article, as amended or added
15 during the regular legislative session in the year 2008,
16 shall apply to all sales made on or after the date of passage
17 and to all returns and payments due on or after that day,
18 except as otherwise expressly provided in this article.

19 (e) The provisions of this article, as amended or added
20 during the 2009 regular legislative session, shall apply to
21 all sales made on or after the date of passage and to all
22 returns and payments due on or after that day, except as
23 otherwise expressly provided in this article.

24 (f) The provisions of this article, as amended or added
25 during the 2010 regular legislative session, shall apply to
26 all sales made on or after the date of passage and to all
27 returns and payments due on or after that day, except as
28 otherwise expressly provided in this article.



The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Signature]
.....
Chairman Senate Committee

[Signature]
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

[Signature]
.....
Clerk of the Senate

[Signature]
.....
Clerk of the House of Delegates

[Signature]
.....
President of the Senate

[Signature]
.....
Speaker House of Delegates

The within *is approved* this the *18th*
Day of *March* , 2010.

[Signature]
.....
Governor

PRESENTED TO THE
GOVERNOR

MAR 17 2010

Time 9:16am