

COMMITTEE SUBSTITUTE

FOR

## **Senate Bill No. 247**

(By Senators Kessler (Acting President) and Hall,  
By Request of the Executive)

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[Originating in the Committee on Economic Development;  
reported February 9, 2011.]

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A BILL to amend and reenact §11-15-8d of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §11-15-9n, all relating to consumers sales and service tax and use tax; specifying that effective July 1, 2011, restrictions on exemptions by a construction contractor do not apply for certain purchases of primary material handling equipment, racking and racking systems and their components nor do these restrictions on exemptions apply to purchases of building materials and certain tangible personal property if the purchaser of contracting services would be entitled to claim a newly created

exemption; specifying exemption for certain purchases of primary material handling equipment, racking and racking systems and their components, building materials and certain tangible personal property; specifying the application for certification of exemption and plan describing investment to be made; specifying application and plan filing date; specifying treatment of late filings and untimely filings of application and plan; specifying loss of exemption if investment is not made within the expansion period; defining terms; specifying exclusions and limitations for qualified warehouses and distribution facilities; specifying exclusions and disqualifications for failure to meet statutory criteria and requirements; specifying over-the-counter sales restrictions; specifying manufacturing, fabrication and assembly restrictions; specifying statute of limitations; specifying issuance of assessments against the purchaser of contracting services entitled to the newly created exemption and not against a contractor who relied in good faith upon validity of an exemption; specifying that the taxpayer first pay to the vendor the tax and then apply to the State Tax Commissioner for a refund or credit; and alternative use of the direct pay permit number.

*Be it enacted by the Legislature of West Virginia:*

That §11-15-8d of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto a new section, designated §11-15-9n, all to read as follows:

**ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.**

**§11-15-8d. Limitations on right to assert exemptions.**

1 (a) Persons who perform “contracting” as defined in  
2 section two of this article, or persons acting in an agency  
3 capacity, may not assert any exemption to which the pur-  
4 chaser of such contracting services or the principal is  
5 entitled. Any statutory exemption to which a taxpayer may  
6 be entitled shall be invalid unless the tangible personal  
7 property or taxable service is actually purchased by such  
8 taxpayer and is directly invoiced to and paid by such  
9 taxpayer. This section shall not apply to purchases by an  
10 employee for his or her employer; purchases by a partner for  
11 his or her partnership; or purchases by a duly authorized  
12 officer of a corporation, or unincorporated organization, for  
13 his or her corporation or unincorporated organization so  
14 long as the purchase is invoiced to and paid by the employer,  
15 partnership, corporation or unincorporated organization.

16 (b) *Transition rule.* — This section shall not apply to  
17 purchases of tangible personal property or taxable services  
18 in fulfillment of a purchasing agent or procurement agent  
19 contract executed and legally binding on the parties thereto  
20 prior to September 15, 1999: *Provided*, That this transition  
21 rule shall not apply to any purchases of tangible personal  
22 property or taxable services made under such a contract  
23 after August 31, 1991; and this transition rule shall not apply  
24 if the primary purpose of the purchasing agent or procure-  
25 ment agent contract was to avoid payment of consumers  
26 sales and use taxes. However, effective July 1, 2007, this  
27 section shall not apply to purchases of services, machinery,  
28 supplies or materials, except gasoline and special fuel, to be  
29 directly used or consumed in the construction, alteration,  
30 repair or improvement of a new or existing building or  
31 structure by a person performing “contracting”, as defined  
32 in section two of this article, if the purchaser of the “con-  
33 tracting” services would be entitled to claim the refundable  
34 exemption under subdivision (2), subsection (b), section nine  
35 of this article had it purchased the services, machinery,  
36 supplies or materials. Effective July 1, 2009, this section  
37 shall not apply to purchases of services, computers, servers,

38 building materials and tangible personal property, except  
39 purchases of gasoline and special fuel, to be installed into a  
40 building or facility or directly used or consumed in the  
41 construction, alteration, repair or improvement of a new or  
42 existing building or structure by a person performing  
43 “contracting”, as defined in section two of this article, if the  
44 purchaser of the “contracting” services would be entitled to  
45 claim the exemption under subdivision (7), subsection (a),  
46 section nine-h of this article. Effective July 1, 2011, this  
47 section shall not apply to qualified purchases of primary  
48 material handling equipment, racking and racking systems,  
49 and their components, or to qualified purchases of building  
50 materials and certain tangible personal property, as those  
51 terms are defined in section nine-n of this article, by a  
52 person performing “contracting,” as defined in section two  
53 of this article, if the purchaser of the “contracting” services  
54 would be entitled to claim the refundable exemption under  
55 section nine-n of this article. Purchases of gasoline and  
56 special fuel shall not be treated as exempt pursuant to this  
57 section.

**§11-15-9n. Exemption of qualified purchases of primary material  
handling equipment, racking and racking systems,**

**and components, building materials and certain  
tangible personal property.**

1 (a) *Definitions.* - For purposes of this section:

2 (1) "Building materials" means all tangible personal  
3 property, including any device or appliance used by builders,  
4 contractors or landowners in making improvements, addi-  
5 tions, or alterations to a building or other structure or to real  
6 property in such a way that such tangible personal property  
7 becomes a part of the building or other structure or the  
8 realty, which is installed into or directly used or consumed  
9 in the construction, addition, alteration, repair or improve-  
10 ment of a qualified, new or expanded warehouse or distribu-  
11 tion facility. "Building materials" does not include tools,  
12 construction equipment or any property or device which does  
13 not become a permanent part of the realty when construction  
14 is completed. A device or appliance becomes a fixture and a  
15 part of the building or other structure or the real property to  
16 which it is connected when it is built into or is attached to  
17 the property in such a way that its removal would substan-  
18 tially damage or deface such property.

19 (2) "Distribution facility" means a warehouse, facility,  
20 structure, or enclosed area which is used primarily for the

21 storage, shipment, preparation for shipment, or any combi-  
22 nation of such activities, of finished goods, consumer ready  
23 wares, and consumer ready merchandise.

24 (3) "Expansion period" means the period of time beginning  
25 one year prior to the start of the construction or expansion  
26 of the qualified, new or expanded warehouse or distribution  
27 facility, and ending one year after the substantial completion  
28 of the construction or expansion of the facility. In no event  
29 shall the expansion period exceed five years.

30 (4) "Full-time employment" for purposes of determining a  
31 full-time employee or a full-time equivalent employee, means  
32 employment for at least one hundred forty hours per month  
33 at a wage not less than the prevailing state or federal  
34 minimum wage, depending on which minimum wage provi-  
35 sion is applicable to the business.

36 (A) For purposes of this definition, any employee paid less  
37 than state or federal minimum wage, depending on which  
38 minimum wage provision is applicable, shall be excluded  
39 from the count of employees for the purpose of determining  
40 the three hundred jobs requirement of this section.

41 (B) For purposes of this definition, seasonal employees and  
42 part-time employees may be converted into full-time equiva-

43 lent employees if the part-time or seasonal employee is  
44 customarily performing job duties not less than twenty hours  
45 per week for at least six months during the tax year. Persons  
46 who have worked less than twenty hours per week or who  
47 have worked less than six months during the tax year do not  
48 qualify as part-time employees or as seasonal employees.

49 (5) "Primary material handling equipment" means the  
50 principal machinery and equipment used directly and  
51 primarily for the handling and movement of tangible  
52 personal property in a qualified, new or expanded warehouse  
53 or distribution facility.

54 (A) The following items may be considered primary  
55 material handling equipment:

56 (i) Conveyers, carousels, lifts, positioners,  
57 pick-up-and-place units, cranes, hoists, mechanical arms  
58 and robots;

59 (ii) Mechanized systems, including containers which are an  
60 integral part thereof, whose purpose is to lift or move  
61 tangible personal property;

62 (iii) Automated storage and retrieval systems, including  
63 computers which control them, whose purpose is to lift or  
64 move tangible personal property; and

65 (iv) Forklifts and other off-the-road vehicles which are  
66 used to lift or move tangible personal property and which  
67 cannot be legally operated on roads and streets.

68 (B) “Primary material handling equipment” does not  
69 include:

70 (i) Motor vehicles licensed for operation on the roads and  
71 highways of this state or any other state of the United States  
72 or any other political jurisdiction;

73 (ii) Parts or equipment used to repair, refurbish, or recon-  
74 dition other equipment; or.

75 (iii) Equipment which replaces, in whole or in part,  
76 primary material handling equipment.

77 (6) “Qualified, new or expanded warehouse or distribution  
78 facility” means a new or expanded facility, subject to the  
79 following:

80 (A) Qualification criteria. “Qualified, new or expanded  
81 warehouse or distribution facility” means a new or expanded  
82 facility located in this state, that is a warehouse or distribu-  
83 tion facility that will employ three hundred or more West  
84 Virginia domiciled, West Virginia residents, as full-time  
85 employees in the warehouse or distribution facility once the  
86 expansion period is complete and which is either:

87 (i) An existing warehouse or distribution facility that will  
88 be expanded over the expansion period where the total value  
89 of all real and personal property purchased or acquired over  
90 the expansion period as direct investment in the facility is  
91 \$50 million or more; or

92 (ii) A new warehouse or distribution facility where the  
93 total value of all real and personal property purchased or  
94 acquired over the expansion period as direct investment in  
95 the facility is \$50 million or more.

96 (B) Exclusions and disqualifications.

97 (i) Subject to the limitations and restrictions set forth in  
98 this section, “qualified, new or expanded warehouse or  
99 distribution facility” does not include a building or facility  
100 where tangible personal property is manufactured, fabri-  
101 cated or assembled.

102 (ii) Subject to the limitations and restrictions set forth in  
103 this section, “qualified, new or expanded warehouse or  
104 distribution facility” does not include a building or facility  
105 where annual calendar year retail sales of tangible personal  
106 property are made over-the-counter from such building or  
107 facility to the general public, if such sales exceed five  
108 percent of the total annual calendar year revenues of the

109 warehouse or distribution facility during the same calendar  
110 year.

111 (iii) Subject to the limitations and restrictions set forth in  
112 this section, “qualified, new or expanded warehouse or  
113 distribution facility” does not include a building or facility  
114 where the average monthly full-time employment (deter-  
115 mined by including full-time equivalent employees) for each  
116 calendar year at the facility is less than three hundred West  
117 Virginia domiciled, West Virginia residents. For purposes of  
118 determining average monthly employment for the calendar  
119 year, the taxpayer shall divide the sum of the twelve monthly  
120 averages of qualified full-time and full-time equivalent West  
121 Virginia employees at the qualified, new or expanded  
122 warehouse or distribution facility by twelve. Each monthly  
123 average is computed as the average of West Virginia employ-  
124 ment at the beginning of each calendar month and at the end  
125 of each calendar month. *Provided*, That the State Tax  
126 Commissioner may specify a different method for computa-  
127 tion of average monthly full-time employment, on a  
128 state-wide basis or on a case-by-case basis, or both, as the  
129 State Tax Commissioner may prescribe.

130 (7) “Qualified West Virginia employee” means a full-time  
131 employee or full-time equivalent employee who is a West  
132 Virginia domiciled West Virginia resident.

133 (8) “Racking and racking systems” means any system of  
134 machinery, equipment, fixtures, or portable devices whose  
135 function is to store, organize, or move tangible personal  
136 property within a warehouse or distribution facility, includ-  
137 ing, but not limited to, conveying systems, chutes, shelves,  
138 racks, bins, drawers, pallets, and other containers and  
139 storage devices which form a necessary part of the facility’s  
140 storage system, and which is used directly and primarily for  
141 the storage, handling and movement of tangible personal  
142 property in a qualified, new or expanded warehouse or  
143 distribution facility.

144 (9) “Tangible personal property” means tangible personal  
145 property as defined in section two, article fifteen-b of this  
146 chapter.

147 (10) “Warehouse” means a facility, structure, or enclosed  
148 area which is used primarily for the storage of finished  
149 goods, consumer ready wares, and consumer ready merchan-  
150 dise.

151 (b) *Exemption.* — Qualified purchases of primary material  
152 handling equipment, racking and racking systems, and  
153 components thereof, building materials and tangible per-  
154 sonal property installed into or directly used or consumed in  
155 the construction, addition, alteration or improvement of a  
156 qualified, new or expanded warehouse or distribution  
157 facility, as such terms are defined in this section, purchased  
158 during the expansion period are exempt from the tax  
159 imposed by this article and article fifteen-a of this chapter.  
160 This exemption may apply either to qualified purchases  
161 made by a person or entity which will be the owner and  
162 operator of the qualified, new or expanded warehouse or  
163 distribution facility or to qualified purchases made by a  
164 lessor or lessee of the qualified, new or expanded warehouse  
165 or distribution facility. A purchase of primary material  
166 handling equipment, racking and racking systems, and  
167 components thereof, building materials and tangible per-  
168 sonal property is a qualified purchase if all requirements for  
169 exemption set forth in this section are met with relation to  
170 the purchase.

171 (c) *Application for certification of exemption and plan*  
172 *describing investment to be made.* —

173 (1) In order to qualify for the exemption authorized by this  
174 section, a taxpayer must submit an application for certifica-  
175 tion of the exemption to the State Tax Commissioner,  
176 together with a plan describing the investment to be made in  
177 the qualified, new or expanded warehouse or distribution  
178 facility. The application and plan shall be submitted on  
179 forms prescribed by the State Tax Commissioner. The plan  
180 shall demonstrate that the requirements of the law will be  
181 met.

182 (2) Filing date. The application for certification of the  
183 exemption and plan describing the investment to be made  
184 must be filed on or before the start of the construction or  
185 expansion of the proposed qualified, new or expanded  
186 warehouse or distribution facility.

187 (3) Late filing. If the taxpayer fails to timely file the  
188 application for certification of the exemption with the State  
189 Tax Commissioner, together with a plan describing the  
190 investment to be made, on or before the start of the construc-  
191 tion or expansion of the proposed qualified, new or expanded  
192 warehouse or distribution facility, the exemption allowed by  
193 this section shall not be available for any purchases of  
194 primary material handling equipment, racking and racking

195 systems, and components thereof, building materials and  
196 tangible personal property otherwise exempt under this  
197 section that were made prior to the filing date of the applica-  
198 tion for certification of the exemption, and no refund shall be  
199 issued for any such purchase.

200 (4) Exemption in cases of untimely filing. Notwithstanding  
201 the untimely filing of the application for certification of the  
202 exemption and plan describing the investment to be made, if  
203 certification of the exemption and plan is issued by the State  
204 Tax Commissioner of an untimely filed application and plan,  
205 the exemption shall be available for qualified purchases and  
206 primary material handling equipment, racking and racking  
207 systems, and components thereof, building materials and  
208 tangible personal property made subsequent to the filing  
209 date of the application and plan and before the end of the  
210 expansion period.

211 (5) Exemption limited to expansion period purchases.

212 (A) Upon approval of the application and certification of  
213 the exemption, qualified purchases of primary material  
214 handling equipment, racking and racking systems, and  
215 components thereof, building materials and tangible per-  
216 sonal property shall be exempt from the tax imposed by this

217 article and article fifteen-a of this chapter. However, if the  
218 requisite investment is not made within the expansion  
219 period, or if the terms and requirements of this section are  
220 not satisfied, the taxpayer shall be subject to assessment for  
221 any tax, penalty or interest that would otherwise have been  
222 due.

223 (B) Limitations. Any statute of limitations set forth in  
224 article ten of this chapter for assessment made under this  
225 subsection for any such tax, penalty or interest shall not  
226 close until five years subsequent to the end of the expansion  
227 period.

228 (d) Any person having a right or claim to any exemption set  
229 forth in this section shall first pay to the vendor the tax  
230 imposed by this article and then apply to the State Tax  
231 Commissioner for a refund or credit or, as provided in  
232 section nine-d of this article, give to the vendor his or her  
233 West Virginia direct pay permit number.

234 (e) *Additional Restrictions, Assessments and Statutes of*  
235 *Limitations.* —

236 (1) Over-the-counter sales restrictions.

237 (A) If within ten years after the end of the expansion  
238 period, over-the-counter sales are made in any one calendar

239 year, from a warehouse or distribution facility for which  
240 qualification for exemption under this section was originally  
241 established, which over-the-counter sales, in the aggregate,  
242 exceed five percent of the total revenues of the warehouse or  
243 distribution facility during the same calendar year, the  
244 taxpayer will be disqualified from receiving the exemption  
245 under this section as of the close of the calendar year in  
246 which over-the-counter sales first exceed five percent of the  
247 total revenues of the warehouse or distribution facility  
248 during the same calendar year; and the taxpayer shall be  
249 subject to assessment for any tax, penalty or interest that  
250 would otherwise have been due had the exemption set forth  
251 in this section never been applied. This over-the-counter  
252 sales restriction shall not apply to any year subsequent to the  
253 end of the tenth year after the end of the expansion period.

254 (B) Limitations. Notwithstanding any other provision of  
255 this code pertaining to statute of limitations to the contrary,  
256 any statute of limitations set forth in article ten of this  
257 chapter for assessment for any such tax, penalty or interest  
258 shall not close until five years subsequent to the end of the  
259 calendar year in which over-the-counter sales first exceed

260 five percent of the total revenues of the warehouse or  
261 distribution facility during the same period.

262 (2) Fabrication and Assembly Restriction.

263 (A) Subject to the restriction and limitations set forth in  
264 this subsection, a qualified new or expanded warehouse or  
265 distribution facility does not include a building or facility  
266 where tangible personal property is manufactured, fabri-  
267 cated or assembled. If during any calendar year within ten  
268 years after the end of the expansion period, the building or  
269 facility for which qualification for exemption under this  
270 section was originally established, is used for manufacturing,  
271 fabrication or assembly of tangible personal property, the  
272 taxpayer will be disqualified from receiving the exemption  
273 set forth in this section as of the date such manufacturing,  
274 fabrication or assembly first occurs, and the taxpayer shall  
275 be subject to assessment for any tax, penalty or interest that  
276 would otherwise have been due had the exemption set forth  
277 in this section never been applied. This restriction against  
278 manufacturing, fabrication and assembly shall not apply to  
279 any year subsequent to the tenth year after the end of the  
280 expansion period.

281 (B) Limitations. Notwithstanding any other provision of  
282 this code pertaining to statute of limitations to the contrary,  
283 any statute of limitations set forth in article ten of this  
284 chapter for assessment for any such tax, penalty or interest  
285 shall not close until five years subsequent to the end of the  
286 calendar year during which such manufacturing, fabrication  
287 or assembly first occurs.

288 (3) Minimum employment restriction.

289 (A) Subject to the limitations and restrictions set forth in  
290 this section, “qualified, new or expanded warehouse or  
291 distribution facility” does not include a building or facility  
292 where the average monthly full-time employment (deter-  
293 mined including full-time equivalent employees) for each  
294 calendar year at the facility is less than three hundred West  
295 Virginia domiciled, West Virginia residents. If during any  
296 calendar year within ten years after the end of the expansion  
297 period, the average monthly full-time employment at the  
298 building or facility for which qualification for exemption  
299 under this section was originally established, is fewer than  
300 three hundred qualified West Virginia employees, then the  
301 taxpayer will be disqualified from receiving the exemption  
302 under this section as of the close of the first calendar year in

303 which the average monthly full-time employment at the  
304 facility is less than three hundred West Virginia domiciled,  
305 West Virginia residents, and the taxpayer shall be subject to  
306 assessment for any tax, penalty or interest that would  
307 otherwise have been due had the exemption set forth in this  
308 section never been applied. This restriction against having  
309 fewer than three hundred qualified West Virginia employees  
310 shall not apply to any year subsequent to the tenth year after  
311 the end of the expansion period.

312 (B) *Limitations.* Notwithstanding any other provision of  
313 this code pertaining to statute of limitations to the contrary,  
314 any statute of limitations set forth in article ten of this  
315 chapter for assessment for any such tax, penalty or interest  
316 shall not close until five years subsequent to the end of the  
317 first calendar year in which the average monthly full-time  
318 employment at the facility is less than three hundred  
319 qualified West Virginia employees.

320 (f) *Assessments Against Taxpayer.* — In circumstances  
321 where the exemption authorized under this section has been  
322 asserted by a contractor pursuant to the provisions of section  
323 eight-d of this article for purchases of primary material  
324 handling equipment, racking and racking systems, and

325 components thereof, building materials and tangible per-  
326 sonal property, the assessment of such tax, interest and  
327 penalties shall issue against, and liability is hereby imposed  
328 upon, the purchaser of the contracting services, which is the  
329 taxpayer entitled to the exemption set forth in this section,  
330 and not against the contractor who relied in good faith upon  
331 the validity of the exemption available under this section to  
332 the purchaser of the contracting services.

333 (g) *Effective date.* — This section is effective on and after  
334 July 1, 2011.

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(NOTE: The purpose of this bill is to authorize an exemption from the consumers sales and service tax and use tax for qualified purchases of primary material handling equipment, racking and racking systems and components thereof, building materials and tangible personal property installed into a new or expanded warehouse or distribution facility which entails at least a \$50 million investment and creates at least three hundred full-time equivalent West Virginia jobs.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

§11-15-9n is new; therefore, strike-throughs and underscoring have been omitted.)