

Senate Bill No. 329

(By Senators Prezioso, D. Facemire, Unger,
Plymale, McCabe and Klempa)

[Introduced January 27, 2011; referred to
the Committee on Finance.]

A BILL to amend and reenact §11-15B-2, §11-15B-2a, §11-15B-24 and §11-15B-32 of the Code of West Virginia, 1931, as amended, all relating to the administration of sales and use tax generally; adding new definitions; clarifying present definitions; incorporating changes to the Streamlined Sales and Use Tax Agreement; adding a computer software maintenance contract as a Streamlined Sales and Use Tax Agreement; relieving seller of tax liability in certain instances; and providing new effective dates.

Be it enacted by the Legislature of West Virginia:

That §11-15B-2, §11-15B-2a, §11-15B-24 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 fifteen
2 and fifteen-a of this chapter, words defined in subsection (b)
3 of this section shall have the meanings ascribed to them in
4 this section, except where a different meaning is distinctly
5 expressed or the context in which the term is used clearly
6 indicates that a different meaning is intended by the Legisla-
7 ture.

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 Tax
12 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 one
15 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 and
19 identifiable; and (ii) the products are sold for one
20 nonitemized price. A “bundled transaction” does not include

21 the sale of any products in which the “sales price” varies, or
22 is negotiable, based on the selection by the purchaser of the
23 products included in the transaction.

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

25 (i) Packaging such as containers, boxes, sacks, bags and
26 bottles or other materials such as wrapping, labels, tags and
27 instruction guides that accompany the “retail sale” of the
28 products and are incidental or immaterial to the “retail sale”
29 thereof. Examples of packaging that are incidental or
30 immaterial include grocery sacks, shoe boxes, dry cleaning
31 garment bags and express delivery envelopes and boxes;

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

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

39 (B) The term “one nonitemized price” does not include a
40 price that is separately identified by product on binding
41 sales or other supporting sales-related documentation made
42 available to the customer in paper or electronic form includ-

43 ing, but not limited to, an invoice, bill of sale, receipt,
44 contract, service agreement, lease agreement, periodic notice
45 of rates and services, rate card or price list.

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

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

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

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

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

66 (II) Sellers shall use either the “purchase price” or the
67 “sales price” of the products to determine if the taxable
68 products are de minimis. Sellers may not use a combination
69 of the “purchase price” and “sales price” of the products to
70 determine if the taxable products are de minimis;

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

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

80 (v) The “retail sale” of exempt tangible personal property,
81 or food and food ingredients taxable at a lower rate of tax,
82 and tangible personal property taxable at the general rate of
83 tax where:

84 (I) The transaction includes “food and food ingredients”,
85 “drugs”, “durable medical equipment”, “mobility-enhancing
86 equipment”, “over-the-counter drugs”, “prosthetic devices”
87 or medical supplies, all as defined in this article; and

88 (II) Where the seller's "purchase price" or "sales price" of
89 the taxable tangible personal property taxable at the general
90 rate of tax is fifty percent or less of the total "purchase
91 price" or "sales price" of the bundled tangible personal
92 property. Sellers may not use a combination of the "purchase
93 price" and "sales price" of the tangible personal property
94 when making the fifty percent determination for a transac-
95 tion.

96 (5) "Candy" means a preparation of sugar, honey or other
97 natural or artificial sweeteners in combination with choco-
98 late, fruits, nuts or other ingredients or flavorings in the form
99 of bars, drops or pieces. "Candy" shall not include any
100 preparation containing flour and shall require no refrigera-
101 tion.

102 (6) "Clothing" means all human wearing apparel suitable
103 for general use. The following list contains examples and is
104 not intended to be an all-inclusive list.

105 (A) "Clothing" shall include:

106 (i) Aprons, household and shop;

107 (ii) Athletic supporters;

108 (iii) Baby receiving blankets;

109 (iv) Bathing suits and caps;

- 110 (v) Beach capes and coats;
- 111 (vi) Belts and suspenders;
- 112 (vii) Boots;
- 113 (viii) Coats and jackets;
- 114 (ix) Costumes;
- 115 (x) Diapers, children and adult, including disposable
- 116 diapers;
- 117 (xi) Ear muffs;
- 118 (xii) Footlets;
- 119 (xiii) Formal wear;
- 120 (xiv) Garters and garter belts;
- 121 (xv) Girdles;
- 122 (xvi) Gloves and mittens for general use;
- 123 (xvii) Hats and caps;
- 124 (xviii) Hosiery;
- 125 (xix) Insoles for shoes;
- 126 (xx) Lab coats;
- 127 (xxi) Neckties;
- 128 (xxii) Overshoes;
- 129 (xxiii) Pantyhose;
- 130 (xxiv) Rainwear;
- 131 (xxv) Rubber pants;

- 132 (xxvi) Sandals;
- 133 (xxvii) Scarves;
- 134 (xxviii) Shoes and shoe laces;
- 135 (xxix) Slippers;
- 136 (xxx) Sneakers;
- 137 (xxxi) Socks and stockings;
- 138 (xxxii) Steel-toed shoes;
- 139 (xxxiii) Underwear;
- 140 (xxxiv) Uniforms, athletic and nonathletic; and
- 141 (xxxv) Wedding apparel.
- 142 (B) "Clothing" shall not include:
- 143 (i) Belt buckles sold separately;
- 144 (ii) Costume masks sold separately;
- 145 (iii) Patches and emblems sold separately;
- 146 (iv) Sewing equipment and supplies, including, but not
- 147 limited to, knitting needles, patterns, pins, scissors, sewing
- 148 machines, sewing needles, tape measures and thimbles; and
- 149 (v) Sewing materials that become part of "clothing"
- 150 including, but not limited to, buttons, fabric, lace, thread,
- 151 yarn and zippers.
- 152 (7) "Clothing accessories or equipment" means incidental
- 153 items worn on the person or in conjunction with "clothing".

154 “Clothing accessories or equipment” are mutually exclusive
155 of and may be taxed differently than apparel within the
156 definition of “clothing”, “sport or recreational equipment”
157 and “protective equipment”. The following list contains
158 examples and is not intended to be an all-inclusive list.

159 “Clothing accessories or equipment” shall include:

160 (A) Briefcases;

161 (B) Cosmetics;

162 (C) Hair notions, including, but not limited to, barrettes,
163 hair bows and hair nets;

164 (D) Handbags;

165 (E) Handkerchiefs;

166 (F) Jewelry;

167 (G) Sunglasses, nonprescription;

168 (H) Umbrellas;

169 (I) Wallets;

170 (J) Watches; and

171 (K) Wigs and hair pieces.

172 (8) “Certified automated system” or “CAS” means software
173 certified under the agreement to calculate the tax imposed
174 by each jurisdiction on a transaction, determine the amount

175 of tax to remit to the appropriate state and maintain a record
176 of the transaction.

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

181 (10) “Computer” means an electronic device that accepts
182 information in digital or similar form and manipulates the
183 information for a result based on a sequence of instructions.

184 (11) “Computer software” means a set of coded instructions
185 designed to cause a “computer” or automatic data processing
186 equipment to perform a task.

187 (12) “Computer software maintenance contract” is a
188 contract that obligates a vendor of computer software, or
189 other person, to provide a customer with future updates or
190 upgrades to computer software, support services with respect
191 to computer software or both. The term “computer software
192 maintenance contract” includes contracts sold by a person
193 other than the vendor of the computer software to which the
194 contract relates.

195 (A) A “mandatory computer software maintenance
196 contract” is a computer software maintenance contract that

197 the customer is obligated by contract to purchase as a
198 condition to the retail sale of computer software.

199 (B) An “optional computer maintenance contract” is a
200 computer software maintenance contract that a customer is
201 not obligated to purchase as a condition to the retail sale of
202 computer software.

203 (13) “Delivered electronically” means delivered to the
204 purchaser by means other than tangible storage media.

205 ~~(12)~~ (14) “Delivery charges” means charges by the seller of
206 personal property or services for preparation and delivery to
207 a location designated by the purchaser of personal property
208 or services including, but not limited to, transportation,
209 shipping, postage, handling, crating and packing.

210 ~~(13)~~ (15) “Dietary supplement” means any product, other
211 than “tobacco”, intended to supplement the diet that:

212 (A) Contains one or more of the following dietary ingredi-
213 ents:

214 (i) A vitamin;

215 (ii) A mineral;

216 (iii) An herb or other botanical;

217 (iv) An amino acid;

218 (v) A dietary substance for use by humans to supplement
219 the diet by increasing the total dietary intake; or

220 (vi) A concentrate, metabolite, constituent, extract or
221 combination of any ingredient described in subparagraph (i)
222 through (v), inclusive, of this paragraph;

223 (B) And is intended for ingestion in tablet, capsule,
224 powder, softgel, gelcap or liquid form, or if not intended for
225 ingestion in such a form, is not represented as conventional
226 food and is not represented for use as a sole item of a meal or
227 of the diet; and

228 (C) Is required to be labeled as a dietary supplement,
229 identifiable by the “Supplemental Facts” box found on the
230 label as required pursuant to 21 CFR § 101.36 or in any
231 successor section of the Code of Federal Regulations.

232 ~~(14)~~ (16) “Direct mail” means printed material delivered or
233 distributed by United States mail or other delivery service to
234 a mass audience or to addressees on a mailing list provided
235 by the purchaser or at the direction of the purchaser when
236 the cost of the items are not billed directly to the recipients.
237 “Direct mail” includes tangible personal property supplied
238 directly or indirectly by the purchaser to the direct mail
239 seller for inclusion in the package containing the printed

240 material. “Direct mail” does not include multiple items of
241 printed material delivered to a single address.

242 ~~(15)~~ (17) “Drug” means a compound, substance or prepara-
243 tion, and any component of a compound, substance or
244 preparation, other than food and food ingredients, dietary
245 supplements or alcoholic beverages:

246 (A) Recognized in the official United States Pharmaco-
247 poeia, official Homeopathic Pharmacopoeia of the United
248 States or official National Formulary, and supplement to any
249 of them;

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

252 (C) Intended to affect the structure or any function of the
253 body. The amendment to this subdivision enacted during the
254 2009 regular legislative session shall apply to sales made
255 after July 1, 2009.

256 ~~(16)~~ (18) “Durable medical equipment” means equipment,
257 including repair and replacement parts for the equipment,
258 but does not include “mobility-enhancing equipment”,
259 which:

260 (A) Can withstand repeated use;

261 (B) Is primarily and customarily used to serve a medical
262 purpose;

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

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

266 ~~(17)~~ (19) “Electronic” means relating to technology having
267 electrical, digital, magnetic, wireless, optical, electromag-
268 netic or similar capabilities.

269 ~~(18)~~ (20) “Eligible property” means an item of a type, such
270 as clothing, that qualifies for a sales tax holiday exemption
271 in this state.

272 ~~(19)~~ (21) “Energy Star qualified product” means a product
273 that meets the energy efficient guidelines set by the United
274 States Environmental Protection Agency and the United
275 States Department of Energy that are authorized to carry the
276 Energy Star label. Covered products are those listed at
277 www.energystar.gov or successor address.

278 ~~(20)~~ (22) “Entity-based exemption” means an exemption
279 based on who purchases the product or service or who sells
280 the product or service. An exemption that is available to all
281 individuals shall not be considered an entity-based exemp-
282 tion.

283 ~~(21)~~ (23) “Food and food ingredients” means substances,
284 whether in liquid, concentrated, solid, frozen, dried or
285 dehydrated form, that are sold for ingestion or chewing by
286 humans and are consumed for their taste or nutritional
287 value. “Food and food ingredients” does not include alco-
288 holic beverages, prepared food or tobacco.

289 ~~(22)~~ (24) “Food sold through vending machines” means
290 food dispensed from a machine or other mechanical device
291 that accepts payment.

292 ~~(23)~~ (25) “Fur clothing” means “clothing” that is required
293 to be labeled as a fur product under the Federal Fur Products
294 Labeling Act (15 U.S.C. §69) and the value of the fur compo-
295 nents in the product is more than three times the value of the
296 next most valuable tangible component. “Fur clothing” is
297 human-wearing apparel suitable for general use but may be
298 taxed differently from “clothing”. For the purposes of the
299 definition of “fur clothing”, the term “fur” means any animal
300 skin or part thereof with hair, fleece or fur fibers attached
301 thereto, either in its raw or processed state, but shall not
302 include such skins that have been converted into leather or
303 suede, or which in processing the hair, fleece or fur fiber has
304 been completely removed.

305 ~~(24)~~ (26) “Governing board” means the governing board of
306 the Streamlined Sales and Use Tax Agreement.

307 ~~(25)~~ (27) “Grooming and hygiene products” are soaps and
308 cleaning solutions, shampoo, toothpaste, mouthwash,
309 antiperspirants and sun tan lotions and screens, regardless
310 of whether the items meet the definition of “over-the-
311 counter drugs”.

312 ~~(26)~~ (28) “Includes” and “including” when used in a
313 definition contained in this article is not considered to
314 exclude other things otherwise within the meaning of the
315 term being defined.

316 ~~(27)~~ (29) “Layaway sale” means a transaction in which
317 property is set aside for future delivery to a customer who
318 makes a deposit, agrees to pay the balance of the purchase
319 price over a period of time and, at the end of the payment
320 period, receives the property. An order is accepted for
321 layaway by the seller when the seller removes the property
322 from normal inventory or clearly identifies the property as
323 sold to the purchaser.

324 ~~(28)~~ (30) “Lease” includes rental, hire and license. “Lease”
325 means any transfer of possession or control of tangible
326 personal property for a fixed or indeterminate term for

327 consideration. A lease or rental may include future options
328 to purchase or extend.

329 (A) “Lease” does not include:

330 (i) A transfer of possession or control of property under a
331 security agreement or deferred payment plan that requires
332 the transfer of title upon completion of the required pay-
333 ments;

334 (ii) A transfer or possession or control of property under an
335 agreement that requires the transfer of title upon completion
336 of required payments and payment of an option price does
337 not exceed the greater of \$100 or one percent of the total
338 required payments; or

339 (iii) Providing tangible personal property along with an
340 operator for a fixed or indeterminate period of time. A
341 condition of this exclusion is that the operator is necessary
342 for the equipment to perform as designed. For the purpose of
343 this subparagraph, an operator must do more than maintain,
344 inspect or set-up the tangible personal property.

345 (iv) “Lease” or “rental” includes agreements covering
346 motor vehicles and trailers where the amount of consider-
347 ation may be increased or decreased by reference to the

348 amount realized upon sale or disposition of the property as
349 defined in 26 U.S.C. §7701(h)(1).

350 (B) This definition shall be used for sales and use tax
351 purposes regardless if a transaction is characterized as a
352 lease or rental under generally accepted accounting princi-
353 ples, the Internal Revenue Code, the Uniform Commercial
354 Code or other provisions of federal, state or local law.

355 ~~(29)~~ (31) “Load and leave” means delivery to the purchaser
356 by use of a tangible storage media where the tangible storage
357 media is not physically transferred to the purchaser.

358 ~~(30)~~ (32) “Mobility-enhancing equipment” means equip-
359 ment, including repair and replacement parts to the equip-
360 ment, but does not include “durable medical equipment”,
361 which:

362 (A) Is primarily and customarily used to provide or in-
363 crease the ability to move from one place to another and
364 which is appropriate for use either in a home or a motor
365 vehicle;

366 (B) Is not generally used by persons with normal mobility;
367 and

368 (C) Does not include any motor vehicle or equipment on a
369 motor vehicle normally provided by a motor vehicle manu-
370 facturer.

371 ~~(31)~~ (33) “Model I seller” means a seller registered under
372 the Streamlined Sales and Use Tax Agreement that has
373 selected a certified service provider as its agent to perform
374 all the seller’s sales and use tax functions, other than the
375 seller’s obligation to remit tax on its own purchases.

376 ~~(32)~~ (34) “Model II seller” means a seller registered under
377 the Streamlined Sales and Use Tax Agreement that has
378 selected a certified automated system to perform part of its
379 sales and use tax functions, but retains responsibility for
380 remitting the tax.

381 ~~(33)~~ (35) “Model III seller” means a seller registered under
382 the agreement that has sales in at least five member states,
383 has total annual sales revenue of at least \$500 million, has a
384 proprietary system that calculates the amount of tax due
385 each jurisdiction and has entered into a performance
386 agreement with the member states that establishes a tax
387 performance standard for the seller. As used in this defini-
388 tion, a seller includes an affiliated group of sellers using the
389 same proprietary system.

390 ~~(34)~~ (36) “Over-the-counter drug” means a drug that
391 contains a label that identifies the product as a drug as

392 required by 21 CFR § 201.66. The “over-the-counter drug”
393 label includes:

394 (A) A “drug facts” panel; or

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

398 ~~(35)~~ (37) “Person” means an individual, trust, estate,
399 fiduciary, partnership, limited liability company, limited
400 liability partnership, corporation or any other legal entity.

401 ~~(36)~~ (38) “Personal service” includes those:

402 (A) Compensated by the payment of wages in the ordinary
403 course of employment; and

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

407 ~~(37)~~ (39) (A) “Prepared food” means:

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

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

411 (iii) Food sold with eating utensils provided by the seller,
412 including plates, knives, forks, spoons, glasses, cups, napkins

413 or straws. A plate does not include a container or packaging
414 used to transport the food.

415 (B) “Prepared food” in subparagraph (ii), paragraph (A) of
416 this subdivision does not include food that is only cut,
417 repackaged or pasteurized by the seller, and eggs, fish, meat,
418 poultry and foods containing these raw animal foods requir-
419 ing cooking by the consumer as recommended by the Food
420 and Drug Administration in Chapter 3, Part 401.11 of its
421 Food Code of 2001 so as to prevent food-borne illnesses.

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

424 (i) Food sold by a seller whose proper primary NAICS
425 classification is manufacturing in Sector 311, except Subsec-
426 tion 3118 (bakeries);

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

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

432 ~~(38)~~ (40) “Prescription” means an order, formula or recipe
433 issued in any form of oral, written, electronic or other means

434 of transmission by a duly licensed practitioner authorized by
435 the laws of this state to issue prescriptions.

436 ~~(39)~~(41) “Prewritten computer software” means “computer
437 software”, including prewritten upgrades, which is not
438 designed and developed by the author or other creator to the
439 specifications of a specific purchaser.

440 (A) The combining of two or more prewritten computer
441 software programs or prewritten portions thereof does not
442 cause the combination to be other than prewritten computer
443 software.

444 (B) “Prewritten computer software” includes software
445 designed and developed by the author or other creator to the
446 specifications of a specific purchaser when it is sold to a
447 person other than the specific purchaser. Where a person
448 modifies or enhances computer software of which the person
449 is not the author or creator, the person is considered to be
450 the author or creator only of the person’s modifications or
451 enhancements.

452 (C) “Prewritten computer software” or a prewritten
453 portion thereof that is modified or enhanced to any degree,
454 where the modification or enhancement is designed and
455 developed to the specifications of a specific purchaser,

456 remains prewritten computer software. However, where
457 there is a reasonable, separately stated charge or an invoice
458 or other statement of the price given to the purchaser for the
459 modification or enhancement, the modification or enhance-
460 ment does not constitute prewritten computer software.

461 ~~(40)~~ (42) “Product-based exemption” means an exemption
462 based on the description of the product or service and not
463 based on who purchases the product or service or how the
464 purchaser intends to use the product or service.

465 ~~(41)~~ (43) “Prosthetic device” means a replacement, correc-
466 tive or supportive device, including repair and replacement
467 parts for the device worn on or in the body, to:

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

469 (B) Prevent or correct physical deformity or malfunction of
470 the body; or

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

472 ~~(42)~~ (44) “Protective equipment” means items for human
473 wear and designed as protection of the wearer against injury
474 or disease or as protections against damage or injury of other
475 persons or property but not suitable for general use.

476 ~~(43)~~ (45) “Purchase price” means the measure subject to the
477 tax imposed by article fifteen or fifteen-a of this chapter and
478 has the same meaning as sales price.

479 ~~(44)~~ (46) “Purchaser” means a person to whom a sale of
480 personal property is made or to whom a service is furnished.

481 ~~(45)~~ (47) “Retail sale” or “sale at retail” means:

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

484 (B) Any sale of a service other than a service purchased for
485 resale.

486 ~~(46)~~ (48) (A) “Sales price” means the measure subject to the
487 tax levied under article fifteen or fifteen-a of this chapter
488 and includes the total amount of consideration, including
489 cash, credit, property and services, for which personal
490 property or services are sold, leased or rented, valued in
491 money, whether received in money or otherwise, without any
492 deduction for the following:

493 (i) The seller’s cost of the property sold;

494 (ii) The cost of materials used, labor or service cost,
495 interest, losses, all costs of transportation to the seller, all
496 taxes imposed on the seller and any other expense of the
497 seller;

498 (iii) Charges by the seller for any services necessary to
499 complete the sale, other than delivery and installation
500 charges;

501 (iv) Delivery charges; and

502 (v) Installation charges.

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

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

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

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

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

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

519 (ii) The seller has an obligation to pass the price reduction
520 or discount through to the purchaser;

521 (iii) The amount of the consideration attributable to the
522 sale is fixed and determinable by the seller at the time of the
523 sale of the item to the purchaser; and

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

525 (I) The purchaser presents a coupon, certificate or other
526 documentation to the seller to claim a price reduction or
527 discount where the coupon, certificate or documentation is
528 authorized, distributed or granted by a third party with the
529 understanding that the third party will reimburse any seller
530 to whom the coupon, certificate or documentation is pre-
531 sented;

532 (II) The purchaser identifies himself or herself to the seller
533 as a member of a group or organization entitled to a price
534 reduction or discount (a “preferred customer” card that is
535 available to any patron does not constitute membership in
536 such a group); or

537 (III) The price reduction or discount is identified as a third-
538 party price reduction or discount on the invoice received by
539 the purchaser or on a coupon, certificate or other documen-
540 tation presented by the purchaser.

541 ~~(47)~~ (49) “Sales tax” means the tax levied under article
542 fifteen of this chapter.

543 ~~(48)~~ (50) “School art supply” means an item commonly
544 used by a student in a course of study for artwork. The term
545 is mutually exclusive of the terms “school supply”, “school

546 instructional material” and “school computer supply” and
547 may be taxed differently. The following is an all-inclusive
548 list:

549 (A) Clay and glazes;

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

551 (C) Paintbrushes for artwork;

552 (D) Sketch and drawing pads; and

553 (E) Watercolors.

554 ~~(49)~~ (51) “School instructional material” means written
555 material commonly used by a student in a course of study as
556 a reference and to learn the subject being taught. The term
557 is mutually exclusive of the terms “school supply”, “school
558 art supply” and “school computer supply” and may be taxed
559 differently. The following is an all-inclusive list:

560 (A) Reference books;

561 (B) Reference maps and globes;

562 (C) Textbooks; and

563 (D) Workbooks.

564 ~~(50)~~ (52) “School computer supply” means an item com-
565 monly used by a student in a course of study in which a
566 computer is used. The term is mutually exclusive of the terms
567 “school supply”, “school art supply” and “school instruc-

568 tional material” and may be taxed differently. The following
569 is an all-inclusive list:

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

571 (B) Handheld electronic schedulers, except devices that are
572 cellular phones;

573 (C) Personal digital assistants, except devices that are
574 cellular phones;

575 (D) Computer printers; and

576 (E) Printer supplies for computers; printer paper, printer
577 ink.

578 ~~(51)~~ (53) “School supply” means an item commonly used by
579 a student in a course of study. The term is mutually exclusive
580 of the terms “school art supply”, “school instructional
581 material” and “school computer supply” and may be taxed
582 differently. The following is an all-inclusive list of school
583 supplies:

584 (A) Binders;

585 (B) Book bags;

586 (C) Calculators;

587 (D) Cellophane tape;

588 (E) Blackboard chalk;

589 (F) Compasses;

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

612 (AA) Writing tablets.

613 ~~(52)~~ (54) "Seller" means any person making sales, leases or
614 rentals of personal property or services.

615 ~~(53)~~ (55) "Service" or "selected service" includes all
616 nonprofessional activities engaged in for other persons for a
617 consideration which involve the rendering of a service as
618 distinguished from the sale of tangible personal property, but
619 does not include contracting, personal services, services
620 rendered by an employee to his or her employer, any service
621 rendered for resale or any service furnished by a business
622 that is subject to the control of the Public Service Commis-
623 sion when the service or the manner in which it is delivered
624 is subject to regulation by the Public Service Commission of
625 this state. The term "service" or "selected service" does not
626 include payments received by a vendor of tangible personal
627 property as an incentive to sell a greater volume of such
628 tangible personal property under a manufacturer's, distribu-
629 tor's or other third-party's marketing support program, sales
630 incentive program, cooperative advertising agreement or
631 similar type of program or agreement and these payments are
632 not considered to be payments for a "service" or "selected
633 service" rendered, even though the vendor may engage in

634 attendant or ancillary activities associated with the sales of
635 tangible personal property as required under the programs
636 or agreements.

637 ~~(54)~~ (56) “Soft drink” means nonalcoholic beverages that
638 contain natural or artificial sweeteners. “Soft drinks” do not
639 include beverages that contain milk or milk products, soy,
640 rice or similar milk substitutes or greater than fifty percent
641 of vegetable or fruit juice by volume.

642 ~~(55)~~ (57) “Sport or recreational equipment” means items
643 designed for human use and worn in conjunction with an
644 athletic or recreational activity that are not suitable for
645 general use. “Sport or recreational equipment” are mutually
646 exclusive of and may be taxed differently than apparel
647 within the definition of “clothing”, “clothing accessories or
648 equipment” and “protective equipment”. The following list
649 contains examples and is not intended to be an all-inclusive
650 list. “Sport or recreational equipment” shall include:

- 651 (A) Ballet and tap shoes;
- 652 (B) Cleated or spiked athletic shoes;
- 653 (C) Gloves, including, but not limited to, baseball, bowling,
654 boxing, hockey and golf;
- 655 (D) Goggles;

656 (E) Hand and elbow guards;

657 (F) Life preservers and vests;

658 (G) Mouth guards;

659 (H) Roller and ice skates;

660 (I) Shin guards;

661 (J) Shoulder pads;

662 (K) Ski boots;

663 (L) Waders; and

664 (M) Wetsuits and fins.

665 ~~(56)~~ (58) “State” means any state of the United States, the
666 District of Columbia and the Commonwealth of Puerto Rico.

667 ~~(57)~~ (59) “Tangible personal property” means personal
668 property that can be seen, weighed, measured, felt or touched
669 or that is in any manner perceptible to the senses. “Tangible
670 personal property” includes, but is not limited to, electricity,
671 steam, water, gas and prewritten computer software.

672 ~~(58)~~ (60) “Tax” includes all taxes levied under articles
673 fifteen and fifteen-a of this chapter and additions to tax,
674 interest and penalties levied under article ten of this chapter.

675 ~~(59)~~ (61) “Tax Commissioner” means the State Tax Com-
676 missioner or his or her delegate. The term “delegate” in the
677 phrase “or his or her delegate”, when used in reference to the

678 Tax Commissioner, means any officer or employee of the
679 State Tax Division duly authorized by the Tax Commissioner
680 directly, or indirectly by one or more redelegations of
681 authority, to perform the functions mentioned or described
682 in this article or rules promulgated for this article.

683 ~~(60)~~(62) “Taxpayer” means any person liable for the taxes
684 levied by articles fifteen and fifteen-a of this chapter or any
685 additions to tax penalties imposed by article ten of this
686 chapter.

687 ~~(61)~~(63) “Telecommunications service” or “telecommuni-
688 cation service” when used in this article and articles fifteen
689 and fifteen-a of this chapter shall have the same meaning as
690 that term is defined in section two-b of this article.

691 ~~(62)~~(64) “Tobacco” means cigarettes, cigars, chewing or
692 pipe tobacco or any other item that contains tobacco.

693 ~~(63)~~(65) “Use tax” means the tax levied under article
694 fifteen-a of this chapter.

695 ~~(64)~~(66) “Use-based exemption” means an exemption
696 based on a specified use of the product or service by the
697 purchaser.

698 ~~(65)~~(67) “Vendor” means any person furnishing services
699 taxed by article fifteen or fifteen-a of this chapter or making

700 sales of tangible personal property or custom software.
701 “Vendor” and “seller” are used interchangeably in this
702 article and in articles fifteen and fifteen-a of this chapter.

703 (c) Additional definitions.

704 Other terms used in this article are defined in articles
705 fifteen and fifteen-a of this chapter, which definitions are
706 incorporated by reference into this article. Additionally,
707 other sections of this article may define terms primarily used
708 in the section in which 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 of
2 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 in
6 section four of this article, except when the context in which
7 the term is used clearly indicates that a different meaning is
8 intended by the Legislature. “Agreement” includes amend-
9 ments to the agreement adopted by the implementing states
10 in calendar years 2003, 2004, 2005, 2006, 2007, 2008, 2009,
11 2010 and amendments adopted by the governing board on or
12 before, January 31, ~~2010~~ 2011, but does not include any

13 substantive changes in the agreement adopted after January
14 31, ~~2010~~ 2011.

§11-15B-24. Administration of exemptions.

1 (a) *General rules.* – When a purchaser claims an exemption
2 from paying tax under article fifteen or fifteen-a of this
3 chapter:

4 (1) Sellers shall obtain identifying information of the
5 purchaser and the reason for claiming a tax exemption at the
6 time of the purchase, as determined by the governing board.

7 (2) A purchaser is not required to provide a signature to
8 claim an exemption from tax unless a paper exemption
9 certificate is used.

10 (3) The seller shall use the standard form for claiming an
11 exemption electronically that is adopted by the governing
12 board.

13 (4) The seller shall obtain the same information for proof
14 of a claimed exemption regardless of the medium in which
15 the transaction occurred.

16 (5) The Tax Commissioner may utilize a system wherein the
17 purchaser exempt from the payment of the tax is issued an
18 identification number that is presented to the seller at the
19 time of the sale.

20 (6) The seller shall maintain proper records of exempt
21 transactions and provide the records to the Tax Commis-
22 sioner or the Tax Commissioner's designee.

23 (7) The Tax Commissioner shall administer use-based and
24 entity-based exemptions when practicable through a direct
25 pay permit, an exemption certificate or another means that
26 does not burden sellers.

27 (8) ~~After December 31, 2007, in~~ In the case of drop ship-
28 ments, a third-party vendor such as a drop shipper may
29 claim a resale exemption based on an exemption certificate
30 provided by its customer/reseller or any other acceptable
31 information available to the third-party vendor evidencing
32 qualification for a resale exemption, regardless of whether
33 the customer/reseller is registered to collect and remit sales
34 and use taxes in this state, when the sale is sourced to this
35 state.

36 (b) The Tax Commissioner shall relieve sellers that follow
37 the requirements of this section from the tax otherwise
38 applicable if it is determined that the purchaser improperly
39 claimed an exemption and shall hold the purchaser liable for
40 the nonpayment of tax. This relief from liability does not
41 apply:

42 (A) To a seller who fraudulently fails to collect the tax;
43 (B) To a seller who solicits purchasers to participate in the
44 unlawful claim of an exemption;
45 (C) To a seller who accepts an exemption certificate when
46 the purchaser claims an entity-based exemption when: (i)
47 The subject of the transaction sought to be covered by the
48 exemption certificate is actually received by the purchaser
49 at a location operated by the seller; and (ii) the state in
50 which that location resides provides an exemption certificate
51 that clearly and affirmatively indicates (graying out exemp-
52 tion reason types on uniform form and posting it on a state's
53 website is an indicator) that the claimed exemption is not
54 available in that state.

55 (c) *Time within which seller must obtain exemption*
56 *certificates.* – A seller is relieved from paying tax otherwise
57 applicable under article fifteen or fifteen-a of this chapter if
58 the seller obtains a fully completed exemption certificate or
59 captures the required data elements within ninety days
60 subsequent to the date of sale.

61 (d)(1) If the seller has not obtained an exemption certificate
62 or all required data elements, the seller ~~may~~ shall, within one
63 hundred twenty days subsequent to a request for substantia-

64 tion by the Tax Commissioner, either prove that the transac-
65 tion was not subject to tax by other means or obtain a fully
66 completed exemption certificate from the purchaser, taken
67 in good faith. For purposes of this section, the Tax Commis-
68 sioner may continue to apply this state's standards of good
69 faith until a uniform standard for good faith is defined in the
70 Streamlined Sales and Use Tax Agreement.

71 (2) If the seller obtains the information described in
72 subdivision (1) of this subsection, the seller shall be relieved
73 of any liability for the tax on the transaction unless it is
74 discovered through the audit process that the seller had
75 knowledge or had reason to know at the time such informa-
76 tion was provided that the information relating to the
77 exemption claimed was materially false or the seller other-
78 wise knowingly participated in activity intended to purpose-
79 fully evade the tax that is properly due on the transaction.

80 ~~(2) (e)~~ Nothing in this section shall affect the ability of the
81 Tax Commissioner to require purchasers to update exemp-
82 tion certificate information or to reapply with the state to
83 claim certain exemptions.

84 ~~(3) (f) Notwithstanding the preceding provisions of this~~
85 ~~section, when an exemption may be claimed by exemption~~

86 certificate, a A seller is relieved from paying the tax other-
87 wise applicable if the seller obtains a blanket exemption
88 certificate from a purchaser with which the seller has a
89 recurring business relationship. ~~The~~ Notwithstanding the
90 provisions of subsection (e) of this section, the Tax Commis-
91 sioner may not request from the seller renewal of blanket
92 certificates or updates of exemption certificate information
93 or data elements when there is a recurring business relation-
94 ship between the buyer and seller. For purposes of this
95 subdivision, a recurring business relationship exists when a
96 period of no more than twelve months elapses between sales
97 transactions.

98 ~~(d)~~(g) *Exception.* – No exemption certificate or direct pay
99 permit number is required when the sale is exempt per se
100 from the taxes imposed by articles fifteen and fifteen-a of
101 this chapter.

§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, shall
3 take effect January 1, 2004, and apply to all sales made on or
4 after that date and to all returns and payments due on or
5 after that day, except as otherwise expressly provided in
6 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 all
10 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 sales
13 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, shall
16 apply to all sales made on or after the date of passage and to
17 all returns and payments due on or after that day, except as
18 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 all
21 sales made on or after the date of passage and to all returns
22 and payments due on or after that day, except as otherwise
23 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 all
26 sales made on or after the date of passage and to all returns
27 and payments due on or after that day, except as otherwise
28 expressly provided in this article.

29 (g) The provisions of this article, as amended or added
30 during the 2011 regular legislative session, shall apply to all
31 sales made on or after the date of passage and to all returns
32 and payments due on or after that day, except as otherwise
33 expressly provided in this article.

(NOTE: This purpose of this bill is to update code provisions to conform to the Streamlined Sales Tax Agreement. The bill adds new definitions and clarifies present definitions. The bill incorporates changes to the Streamlined Sales and Use Tax Agreement and adds computer software maintenance contracts as a Streamlined Sales and Use Tax Agreement. The bill also relieves a seller of tax liability in certain instances. The bill provides new effective dates.

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

FINANCE COMMITTEE AMENDMENT

By striking out the title and substituting therefor a new title, to read as follows:

Eng. Senate Bill No. 329—A Bill to amend and reenact §11-15B-2, §11-15B-2a, §11-15B-24 and §11-15B-32 of the Code of West Virginia, 1931, as amended, all relating to the administration of sales and use tax generally; adding new definitions; clarifying present definitions; incorporating changes to the Streamlined Sales and Use Tax Agreement; adding a computer software maintenance contract as a Streamlined Sales and Use Tax Agreement defined term; relieving seller of tax liability in certain instances; and providing new effective dates.