

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

Senate Bill 100

FISCAL
NOTE

BY SENATOR ROMANO

[Introduced January 10, 2018; Referred
to the Committee on Tax Reform; and then to the
Committee on Finance]

1 A BILL to amend and reenact §11-15-2 of the Code of West Virginia, 1931, as amended; to amend
2 said code by adding thereto a new section, designated §11-15-3d; and to amend and
3 reenact §11-15A-2 and §11-15A-10 of said code, all relating to imposing the consumers
4 sales and service tax and the use tax on digital goods, digital products and digital services
5 as of a specified date; defining terms; establishing what is subject to the tax and what is
6 exempted; requiring the sales of taxable digital code and digital products to be subject to
7 certain transaction sourcing rules in current code; and clarifying the calculation for
8 remittance of the use tax.

Be it enacted by the Legislature of West Virginia:

ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.

§11-15-2. Definitions.

1 (a) *General.* When used in this article and §11-15A-1 *et seq.* of this code, words defined
2 in subsection (b) of this section have the meanings ascribed to them in this section, except in
3 those instances where a different meaning is provided in this article or the context in which the
4 word is used clearly indicates that a different meaning is intended by the Legislature.

5 (b) *Definitions.*

6 (1) "Business" includes all activities engaged in or caused to be engaged in with the object
7 of gain or economic benefit, direct or indirect, and all activities of the state and its political
8 subdivisions which involve sales of tangible personal property or the rendering of services when
9 those service activities compete with or may compete with the activities of other persons.

10 (2) "Communication" means all telephone, radio, light, light wave, radio telephone,
11 telegraph and other communication or means of communication, whether used for voice
12 communication, computer data transmission or other encoded symbolic information transfers and
13 includes commercial broadcast radio, commercial broadcast television and cable television.

14 (3) "Contracting":

15 (A) *In general.* "Contracting" means and includes the furnishing of work, or both materials

16 and work, for another (by a sole contractor, general contractor, prime contractor, subcontractor
17 or construction manager) in fulfillment of a contract for the construction, alteration, repair,
18 decoration or improvement of a new or existing building or structure, or any part thereof, or for
19 removal or demolition of a building or structure, or any part thereof, or for the alteration,
20 improvement or development of real property. Contracting also includes services provided by a
21 construction manager so long as the project for which the construction manager provides the
22 services results in a capital improvement to a building or structure or to real property.

23 (B) *Form of contract not controlling.* An activity that falls within the scope of the definition
24 of contracting constitutes contracting regardless of whether the contract governing the activity is
25 written or verbal and regardless of whether it is in substance or form a lump sum contract, a cost-
26 plus contract, a time and materials contract, whether or not open-ended, or any other kind of
27 construction contract.

28 (C) *Special rules.* For purposes of this definition:

29 (i) The term "structure" includes, but is not limited to, everything built up or composed of
30 parts joined together in some definite manner and attached or affixed to real property or which
31 adds utility to real property or any part thereof or which adds utility to a particular parcel of property
32 and is intended to remain there for an indefinite period of time;

33 (ii) The term "alteration" means, and is limited to, alterations which are capital
34 improvements to a building or structure or to real property;

35 (iii) The term "repair" means, and is limited to, repairs which are capital improvements to
36 a building or structure or to real property;

37 (iv) The term "decoration" means, and is limited to, decorations which are capital
38 improvements to a building or structure or to real property;

39 (v) The term "improvement" means, and is limited to, improvements which are capital
40 improvements to a building or structure or to real property;

41 (vi) The term "capital improvement" means improvements that are affixed to or attached

42 to and become a part of a building or structure or the real property or which add utility to real
43 property, or any part thereof, and that last or are intended to be relatively permanent. As used
44 herein, "relatively permanent" means lasting at least a year in duration without the necessity for
45 regularly scheduled recurring service to maintain the capital improvement. "Regular recurring
46 service" means regularly scheduled service intervals of less than one year;

47 (vii) Contracting does not include the furnishing of work, or both materials and work, in the
48 nature of hookup, connection, installation or other services if the service is incidental to the retail
49 sale of tangible personal property from the service provider's inventory: *Provided*, That the
50 hookup, connection or installation of the foregoing is incidental to the sale of the same and
51 performed by the seller thereof or performed in accordance with arrangements made by the seller
52 thereof. Examples of transactions that are excluded from the definition of contracting pursuant to
53 this subdivision include, but are not limited to, the sale of wall-to-wall carpeting and the installation
54 of wall-to-wall carpeting, the sale, hookup and connection of mobile homes, window air
55 conditioning units, dishwashers, clothing washing machines or dryers, other household
56 appliances, drapery rods, window shades, venetian blinds, canvas awnings, free-standing
57 industrial or commercial equipment and other similar items of tangible personal property. Repairs
58 made to the foregoing are within the definition of contracting if the repairs involve permanently
59 affixing to or improving real property or something attached thereto which extends the life of the
60 real property or something affixed thereto or allows or intends to allow the real property or thing
61 permanently attached thereto to remain in service for a year or longer; and

62 (viii) The term "construction manager" means a person who enters into an agreement to
63 employ, direct, coordinate or manage design professionals and contractors who are hired and
64 paid directly by the owner or the construction manager. The business activities of a "construction
65 manager" as defined in this subdivision constitute contracting, so long as the project for which the
66 construction manager provides the services results in a capital improvement to a building or
67 structure or to real property.

68 (4) "Digital code" has the same meaning as in §11-15-3d of this code;

69 (5) "Digital products" has the same meaning as in §11-15-3d of this code;

70 ~~(4)~~ (6) "Directly used or consumed" in the activities of manufacturing, transportation,
71 transmission, communication or the production of natural resources means used or consumed in
72 those activities or operations which constitute an integral and essential part of the activities, as
73 contrasted with and distinguished from those activities or operations which are simply incidental,
74 convenient or remote to the activities.

75 (A) Uses of property or consumption of services which constitute direct use or
76 consumption in the activities of manufacturing, transportation, transmission, communication or
77 the production of natural resources include only:

78 (i) In the case of tangible personal property, physical incorporation of property into a
79 finished product resulting from manufacturing production or the production of natural resources;

80 (ii) Causing a direct physical, chemical or other change upon property undergoing
81 manufacturing production or production of natural resources;

82 (iii) Transporting or storing property undergoing transportation, communication,
83 transmission, manufacturing production or production of natural resources;

84 (iv) Measuring or verifying a change in property directly used in transportation,
85 communication, transmission, manufacturing production or production of natural resources;

86 (v) Physically controlling or directing the physical movement or operation of property
87 directly used in transportation, communication, transmission, manufacturing production or
88 production of natural resources;

89 (vi) Directly and physically recording the flow of property undergoing transportation,
90 communication, transmission, manufacturing production or production of natural resources;

91 (vii) Producing energy for property directly used in transportation, communication,
92 transmission, manufacturing production or production of natural resources;

93 (viii) Facilitating the transmission of gas, water, steam or electricity from the point of their

94 diversion to property directly used in transportation, communication, transmission, manufacturing
95 production or production of natural resources;

96 (ix) Controlling or otherwise regulating atmospheric conditions required for transportation,
97 communication, transmission, manufacturing production or production of natural resources;

98 (x) Serving as an operating supply for property undergoing transmission, manufacturing
99 production or production of natural resources, or for property directly used in transportation,
100 communication, transmission, manufacturing production or production of natural resources;

101 (xi) Maintaining or repairing of property, including maintenance equipment, directly used
102 in transportation, communication, transmission, manufacturing production or production of natural
103 resources;

104 (xii) Storing, removal or transportation of economic waste resulting from the activities of
105 manufacturing, transportation, communication, transmission or the production of natural
106 resources;

107 (xiii) Engaging in pollution control or environmental quality or protection activity directly
108 relating to the activities of manufacturing, transportation, communication, transmission or the
109 production of natural resources and personnel, plant, product or community safety or security
110 activity directly relating to the activities of manufacturing, transportation, communication,
111 transmission or the production of natural resources; or

112 (xiv) Otherwise using as an integral and essential part of transportation, communication,
113 transmission, manufacturing production or production of natural resources.

114 (B) Uses of property or services which do not constitute direct use or consumption in the
115 activities of manufacturing, transportation, transmission, communication or the production of
116 natural resources include, but are not limited to:

117 (i) Heating and illumination of office buildings;

118 (ii) Janitorial or general cleaning activities;

119 (iii) Personal comfort of personnel;

120 (iv) Production planning, scheduling of work or inventory control;

121 (v) Marketing, general management, supervision, finance, training, accounting and
122 administration; or

123 (vi) An activity or function incidental or convenient to transportation, communication,
124 transmission, manufacturing production or production of natural resources, rather than an integral
125 and essential part of these activities.

126 ~~(5)~~ (7) "Directly used or consumed" in the activities of gas storage, the generation or
127 production or sale of electric power, the provision of a public utility service or the operation of a
128 utility business means used or consumed in those activities or operations which constitute an
129 integral and essential part of those activities or operation, as contrasted with and distinguished
130 from activities or operations which are simply incidental, convenient or remote to those activities.

131 (A) Uses of property or consumption of services which constitute direct use or
132 consumption in the activities of gas storage, the generation or production or sale of electric power,
133 the provision of a public utility service or the operation of a utility business include only:

134 (i) Tangible personal property, custom software, digital code, digital products, or services,
135 including equipment, machinery, apparatus, supplies, fuel and power and appliances, which are
136 used immediately in production or generation activities and equipment, machinery, supplies, tools
137 and repair parts used to keep in operation exempt production or generation devices. For purposes
138 of this subsection, production or generation activities shall commence from the intake, receipt or
139 storage of raw materials at the production plant site;

140 (ii) Tangible personal property, custom software, digital code, digital products, or services,
141 including equipment, machinery, apparatus, supplies, fuel and power, appliances, pipes, wires
142 and mains, which are used immediately in the transmission or distribution of gas, water and
143 electricity to the public, and equipment, machinery, tools, repair parts and supplies used to keep
144 in operation exempt transmission or distribution devices, and these vehicles and their equipment
145 as are specifically designed and equipped for those purposes are exempt from the tax when used

146 to keep a transmission or distribution system in operation or repair. For purposes of this
147 subsection, transmission or distribution activities shall commence from the close of production at
148 a production plant or wellhead when a product is ready for transmission or distribution to the public
149 and shall conclude at the point where the product is received by the public;

150 (iii) Tangible personal property, custom software, digital code, digital products, or services,
151 including equipment, machinery, apparatus, supplies, fuel and power, appliances, pipes, wires
152 and mains, which are used immediately in the storage of gas or water, and equipment, machinery,
153 tools, supplies and repair parts used to keep in operation exempt storage devices;

154 (iv) Tangible personal property, custom software, digital code, digital products, or services
155 used immediately in the storage, removal or transportation of economic waste resulting from the
156 activities of gas storage, the generation or production or sale of electric power, the provision of a
157 public utility service or the operation of a utility business;

158 (v) Tangible personal property, custom software, digital code, digital products, or services
159 used immediately in pollution control or environmental quality or protection activity or community
160 safety or security directly relating to the activities of gas storage, generation or production or sale
161 of electric power, the provision of a public utility service or the operation of a utility business.

162 (B) Uses of property, digital code, digital products, or services which would not constitute
163 direct use or consumption in the activities of gas storage, generation or production or sale of
164 electric power, the provision of a public utility service or the operation of a utility business include,
165 but are not limited to:

166 (i) Heating and illumination of office buildings;

167 (ii) Janitorial or general cleaning activities;

168 (iii) Personal comfort of personnel;

169 (iv) Production planning, scheduling of work or inventory control;

170 (v) Marketing, general management, supervision, finance, training, accounting and
171 administration; or

172 (vi) An activity or function incidental or convenient to the activities of gas storage,
173 generation or production or sale of electric power, the provision of public utility service or the
174 operation of a utility business.

175 ~~(6)~~ (8) "Gas storage" means the injection of gas into a storage reservoir or the storage of
176 gas for any period of time in a storage reservoir or the withdrawal of gas from a storage reservoir
177 engaged in by businesses subject to the business and occupation tax imposed by §11-13-2 and
178 §11-13-2e of this code.

179 ~~(7)~~ (9) "Generating or producing or selling of electric power" means the generation,
180 production or sale of electric power engaged in by businesses subject to the business and
181 occupation tax imposed by §11-13-2, §11-13-2d, §11-13-2m or §11-13-2n of this code.

182 ~~(8)~~ (10) "Gross proceeds" means the amount received in money, credits, property or other
183 consideration from sales and services within this state, without deduction on account of the cost
184 of property sold, amounts paid for interest or discounts or other expenses whatsoever. Losses
185 may not be deducted, but any credit or refund made for goods returned may be deducted.

186 ~~(9)~~ (11) "Includes" and "including", when used in a definition contained in this article, does
187 not exclude other things otherwise within the meaning of the term being defined.

188 ~~(40)~~ (12) "Manufacturing" means a systematic operation or integrated series of systematic
189 operations engaged in as a business or segment of a business which transforms or converts
190 tangible personal property by physical, chemical or other means into a different form, composition
191 or character from that in which it originally existed.

192 ~~(44)~~ (13) "Person" means any individual, partnership, association, corporation, limited
193 liability company, limited liability partnership or any other legal entity, including this state or its
194 political subdivisions or an agency of either, or the guardian, trustee, committee, executor or
195 administrator of any person.

196 ~~(42)~~ (14) "Personal service" includes those: (A) Compensated by the payment of wages
197 in the ordinary course of employment; and (B) rendered to the person of an individual without, at

198 the same time, selling tangible personal property, such as nursing, barbering, shoe shining,
199 manicuring and similar services.

200 ~~(13)~~ (15) "Prepaid wireless calling service" means a telecommunications service that
201 provides the right to utilize mobile wireless service as well as other nontelecommunications
202 services, including the download of digital products delivered electronically, content and ancillary
203 services, which must be paid for in advance that is sold in predetermined units or dollars of which
204 the number decline with use in a known amount.

205 ~~(14)~~ (16) Production of natural resources.

206 (A) "Production of natural resources" means, except for oil and gas, the performance, by
207 either the owner of the natural resources or another, of the act or process of exploring, developing,
208 severing, extracting, reducing to possession and loading for shipment and shipment for sale, profit
209 or commercial use of any natural resource products and any reclamation, waste disposal or
210 environmental activities associated therewith and the construction, installation or fabrication of
211 ventilation structures, mine shafts, slopes, boreholes, dewatering structures, including associated
212 facilities and apparatus, by the producer or others, including contractors and subcontractors, at a
213 coal mine or coal production facility.

214 (B) For the natural resources oil and gas, "production of natural resources" means the
215 performance, by either the owner of the natural resources, a contractor or a subcontractor, of the
216 act or process of exploring, developing, drilling, well-stimulation activities such as logging,
217 perforating or fracturing, well-completion activities such as the installation of the casing, tubing
218 and other machinery and equipment and any reclamation, waste disposal or environmental
219 activities associated therewith, including the installation of the gathering system or other pipeline
220 to transport the oil and gas produced or environmental activities associated therewith and any
221 service work performed on the well or well site after production of the well has initially commenced.

222 (C) All work performed to install or maintain facilities up to the point of sale for severance
223 tax purposes is included in the "production of natural resources" and subject to the direct use

224 concept.

225 (D) "Production of natural resources" does not include the performance or furnishing of
226 work, or materials or work, in fulfillment of a contract for the construction, alteration, repair,
227 decoration or improvement of a new or existing building or structure, or any part thereof, or for
228 the alteration, improvement or development of real property, by persons other than those
229 otherwise directly engaged in the activities specifically set forth in this subdivision as "production
230 of natural resources".

231 ~~(15)~~ (17) "Providing a public service or the operating of a utility business" means the
232 providing of a public service or the operating of a utility by businesses subject to the business and
233 occupation tax imposed by §11-13-2 and §11-13-2d of this code.

234 ~~(16)~~ (18) "Purchaser" means a person who purchases tangible personal property, custom
235 software or a service taxed by this article.

236 ~~(17)~~ (19) "Sale", "sales" or "selling" includes any transfer of the possession or ownership
237 of tangible personal property, digital code, digital products, or custom software for a consideration,
238 including a lease or rental, when the transfer or delivery is made in the ordinary course of the
239 transferor's business and is made to the transferee or his or her agent for consumption or use or
240 any other purpose. "Sale" also includes the furnishing of a service for consideration.
241 Notwithstanding anything to the contrary in this code, effective after June 30, 2008, "sale" also
242 includes the furnishing of prepaid wireless calling service for consideration.

243 ~~(18)~~ (20) "Service" or "selected service" includes all nonprofessional activities engaged in
244 for other persons for a consideration, which involve the rendering of a service as distinguished
245 from the sale of tangible personal property, digital code, digital products, or custom software, but
246 does not include contracting, personal services or the services rendered by an employee to his
247 or her employer or any service rendered for resale: *Provided*, That the term "service" or "selected
248 service" does not include payments received by a vendor of tangible personal property as an
249 incentive to sell a greater volume of such tangible personal property under a manufacturer's,

250 distributor's or other third party's marketing support program, sales incentive program,
251 cooperative advertising agreement or similar type of program or agreement, and these payments
252 are not considered to be payments for a "service" or "selected service" rendered, even though
253 the vendor may engage in attendant or ancillary activities associated with the sales of tangible
254 personal property as required under the programs or agreements

255 ~~(19)~~ (21) "Streamlined Sales and Use Tax Agreement" or "agreement", when used in this
256 article, has the same meaning as when used in §11-15B-1 *et seq.* of this code, except when the
257 context in which the word "agreement" is used clearly indicates that a different meaning is
258 intended by the Legislature.

259 ~~(20)~~ (22) "Tax" includes all taxes, additions to tax, interest and penalties levied under this
260 article or §11-10-1 *et seq.* of this code.

261 ~~(24)~~ (23) "Tax Commissioner" means the State Tax Commissioner or his or her delegate.
262 The term "delegate" in the phrase "or his or her delegate", when used in reference to the Tax
263 Commissioner, means any officer or employee of the state Tax Division duly authorized by the
264 Tax Commissioner directly, or indirectly by one or more redelegations of authority, to perform the
265 functions mentioned or described in this article or rules promulgated for this article.

266 ~~(22)~~ (24) "Taxpayer" means any person liable for the tax imposed by this article or
267 additions to tax, penalties and interest imposed by §11-10-1 *et seq.* of this code.

268 ~~(23)~~ (25) "Transmission" means the act or process of causing liquid, natural gas or
269 electricity to pass or be conveyed from one place or geographical location to another place or
270 geographical location through a pipeline or other medium for commercial purposes.

271 ~~(24)~~ (26) "Transportation" means the act or process of conveying, as a commercial
272 enterprise, passengers or goods from one place or geographical location to another place or
273 geographical location.

274 ~~(25)~~ (27) "Ultimate consumer" or "consumer" means a person who uses or consumes
275 services, digital code, digital products, or personal property.

276 ~~(26)~~ (28) "Vendor" means any person engaged in this state in furnishing services taxed by
 277 this article or making sales of tangible personal property, digital code, digital products, or custom
 278 software. "Vendor" and "seller" are used interchangeably in this article.

279 (c) *Additional definitions.* Other terms used in this article are defined in §11-15B-1 *et seq.*
 280 of this code, which definitions are incorporated by reference into this article. Additionally, other
 281 terms used in this section may be defined in other sections of this article. ~~may define terms~~
 282 ~~primarily used in the section in which the term is defined~~

§11-15-3d. Imposition of consumers sales tax on sales of digital products, digital code and digital services.

1 (a) On and after July 1, 2018, sales of digital code, digital products and digital services
 2 electronically transferred to the purchaser is subject to the consumers sales and service tax
 3 imposed by this article, except as otherwise provided in this article, and the use of digital code,
 4 digital products and digital services electronically transferred to the purchaser is subject to the
 5 use tax imposed by §11-15A-1 *et seq.* of this code, except as otherwise provided in article fifteen-
 6 a of this chapter. The tax imposed by this article shall apply to sales of digital code, digital products
 7 and digital services electronically transferred to the purchaser regardless of whether the digital
 8 code, digital product or digital service is provided for permanent use or less than permanent use
 9 and regardless of whether continued payment is required.

10 (b) *Definitions* —

11 (1) "Designated digital products" means digital audio works, digital audio-visual works,
 12 digital books, video game digital products and digital automated services that are electronically
 13 transferred to a purchaser.

14 (2) "Digital audio-visual works" means a series of related images which, when shown in
 15 succession, impart an impression of motion, together with accompanying sound, if any. Digital
 16 audio-visual works include such items as motion pictures, movies, music videos, news and
 17 entertainment and live events. Digital audio-visual works do not include audio greeting cards sent

18 by electronic mail. Digital audio-visual works includes the digital code, or a subscription to or
19 access to a digital code, for receiving, accessing, or otherwise obtaining digital audio-visual-
20 works.

21 (3) "Digital audio works" means works that result from the fixation of a series of musical,
22 spoken, or other sounds including ringtones. Digital audio works includes such items as the
23 following which may either be prerecorded or live: songs, music, readings of books or other written
24 materials, speeches, ringtones, or other sound recordings. Digital audio works does not include
25 audio greeting cards sent by electronic mail. Unless the context provides otherwise, in this article
26 digital audio works includes the digital code, or a subscription to or access to a digital code, for
27 receiving, accessing, or otherwise obtaining digital audio works.

28 (4) "Digital automated service" means any service transferred electronically that uses one
29 or more software applications that would be taxable if the results of the service were transferred
30 on a tangible medium, but it does not include:

31 (A) Any service that primarily involves the application of human effort by the seller, and
32 the human effort originated after the customer requested the service;

33 (B) The loaning or transferring of money or the purchase, sale, or transfer of financial
34 instruments. For purposes of this section, "financial instruments" include cash, accounts
35 receivable and payable, loans and notes receivable and payable, debt securities, equity
36 securities, as well as derivative contracts such as forward contracts, swap contracts, and options;

37 (C) Dispensing cash or other physical items from a machine;

38 (D) Payment processing services;

39 (E) Telecommunications services and ancillary services as those terms are defined in
40 §11-15B-1 et seq. of this code; or

41 (F) The Internet and Internet access.

42 (5) "Digital books" means works that are generally recognized in the ordinary and usual
43 sense as "books." It includes works of fiction and nonfiction and short stories. It does not include

44 periodicals, magazines, newspapers, or other news or information productions, chat rooms, or
45 weblogs. Unless the context provides otherwise, in this chapter digital books includes the digital
46 code, or a subscription to access to a digital code, for receiving, accessing, or otherwise obtaining
47 digital books.

48 (6) "Digital code" means a code which provides a purchaser with a right to obtain one or
49 more digital products. "Digital code" does not include a code that represents a stored monetary
50 value that is deducted from the total as it is used by the purchaser. "Digital code" also does not
51 include a code that represents a redeemable card, gift card, or gift certificate that entitles the
52 holder to select digital products of an indicated cash value, which digital products are subject to
53 tax when the digital product is selected. A digital code may be obtained by any means, including
54 e-mail or by tangible means regardless of its designation as song code, video code, book code,
55 or some other term.

56 (7) "Digital goods" means sounds, images, data, facts, or information, or any combination
57 thereof, transferred electronically, including, but not limited to, designated digital products and
58 other products transferred electronically not included within the definition of designated digital
59 products. However, the term " digital goods " does not include:

60 (A) Telecommunications services and ancillary services as those terms are defined in
61 §11-15B-1 et seq. of this code;

62 (B) Computer software as defined in §11-15B-1 et seq. of this code; or

63 (C) The Internet and Internet access service as those terms are defined the Internet Tax
64 Freedom Act, Title 47, U.S.C. §151 note, as existing on July 1, 2009.

65 (8) "Digital products" means digital audio-visual works, digital audio works, digital
66 automated services, digital books, other digital products and designated digital products.

67 (9) "Electronically transferred" or "transferred electronically" means obtained by the
68 purchaser by means other than tangible storage media. It is not necessary that a copy of the
69 product be physically transferred to the purchaser. So long as the purchaser may access the

70 product, it will be considered to have been electronically transferred to the purchaser.

71 (10) "Internet access service" means a service that enables users to access content,
 72 information, electronic mail, or other services offered over the Internet and may also include
 73 access to proprietary content, information, and other services as part of a package of services
 74 offered to consumers. The term does not include telecommunications services.

75 (11) "Other digital products" means and includes, but is not limited to, the following when
 76 electronically transferred:

77 (A) Periodicals;

78 (B) Magazines;

79 (C) Video or electronic games; and

80 (D) Newspapers or other news or information products.

81 (12) "Ringtone" means digitized sound files that are downloaded onto a device and that
 82 may be used to alert the customer with respect to a communication

83 (c) The sales of digital code and digital products on which tax is imposed by this section
 84 is subject to the transaction sourcing rules in §11-15B-1 et seq. of this code.

85 (d) For purposes of this section, the sale, license, lease, or rental of or the storage, use,
 86 or other consumption of a digital code is treated the same as the sale, license, lease, or rental of
 87 or the storage, use, or other consumption of any digital product to which the digital code relates.

ARTICLE 15A. USE TAX.

§11-15A-2. Imposition of tax; ~~six percent~~ tax rate; inclusion of services as taxable; transition rules; allocation of tax and transfers.

1 (a) An excise tax is hereby levied and imposed on the use in this state of tangible personal
 2 property, custom software or taxable services, to be collected and paid as provided in this article
 3 or §11-15B-1 et seq. of this code, at the rate of six percent of the purchase price of the property,
 4 digital code, digital product or taxable services, except as otherwise provided in this article.

5 (b) *Calculation of tax on fractional parts of a dollar.* -- The tax computation under

6 subsection (a) of this section shall be carried to the third decimal place and the tax rounded up to
7 the next whole cent whenever the third decimal place is greater than four and rounded down to
8 the lower whole cent whenever the third decimal place is four or less. The vendor may elect to
9 compute the tax due on a transaction on a per item basis or on an invoice basis provided the
10 method used is consistently used during the reporting period.

11 (c) "Taxable services," for the purposes of this article, means services of the nature that
12 are subject to the tax imposed by §11-15-1 *et seq.* of this code. In this article, wherever the words
13 "tangible personal property" or "property" appear, the same shall include the words "or taxable
14 services," where the context so requires.

15 (d) Use tax is hereby imposed upon every person using tangible personal property, digital
16 code, digital products, custom software, digital services or other taxable service within this state.
17 That person's liability is not extinguished until the tax has been paid. A receipt with the tax
18 separately stated thereon issued by a retailer engaged in business in this state, or by a foreign
19 retailer who is authorized by the Tax Commissioner to collect the tax imposed by this article,
20 relieves the purchaser from further liability for the tax to which the receipt refers.

21 (e) Purchases of tangible personal property, digital code, digital products, digital services
22 or other taxable services made for the government of the United States or any of its agencies by
23 ultimate consumers is subject to the tax imposed by this section. Industrial materials and
24 equipment owned by the federal government within the State of West Virginia of a character not
25 ordinarily readily obtainable within the state, is not subject to use tax when sold, if the industrial
26 materials and equipment would not be subject to use taxes if sold outside of the state for use in
27 West Virginia.

28 (f) This article does not apply to purchases made by counties or municipal corporations.

§11-15A-10. Payment to Tax Commissioner.

1 (a) Each retailer required or authorized, pursuant to §11-15A-6, §11-15A-6a or §11-15A-7
2 of this code, or pursuant to §11-15B-1 *et seq.* of this code, to collect the tax imposed in §11-15A-2

3 of this code is required to pay to the Tax Commissioner the amount of the tax on or before the
4 twentieth day of the month next succeeding each calendar month, except as otherwise provided
5 in this article or §11-15B-1 *et seq.* of this code.

6 (b) Each certified service provider for a Model I seller shall pay to the Tax Commissioner
7 the tax levied by this article on or before the twentieth day of the month next succeeding the
8 calendar month in which the tax accrued, except as otherwise provided in this article or §11-15B-1
9 *et seq.* of this code.

10 (c) At that time, each retailer, seller or certified service provider shall file with the Tax
11 Commissioner a return for the preceding monthly period, except as otherwise provided in this
12 article or §11-15B-1 *et seq.* of this code, in the form prescribed by the Tax Commissioner showing
13 the sales price of any or all tangible personal property, custom software and taxable services sold
14 by the retailer or seller during the preceding quarterly period, the use of which is subject to the
15 tax imposed by this article, and any other information the Tax Commissioner may consider
16 necessary for the proper administration of this article. The return shall be accompanied by a
17 remittance of the amount of the tax, for the period covered by the return, except as otherwise
18 provided in this article or §11-15B-1 *et seq.* of this code: *Provided*, That where the tangible
19 personal property, digital code, digital products or custom software is sold under a conditional
20 sales contract, or under any other form of sale wherein the payment of the principal sum, or a part
21 of the sum is extended over a period longer than sixty days from the date of the sale, the retailer
22 may collect and remit each monthly period that portion of the tax equal to six percent of that
23 portion of the purchase price actually received during the monthly period: *Provided*, That
24 beginning July 1, 2018, the tax to be remitted shall be determined by multiplying the portion of the
25 purchase price actually received during the monthly period by the general consumers sales and
26 service tax rate specified in §11-15-3 of this code.

27 (d) The Tax Commissioner may, upon request and a proper showing of the necessity to
28 do so, grant an extension of time not to exceed thirty days for making any return and payment.

29 (e) Returns shall be signed by the retailer or seller or his or her duly authorized agent, and
30 must be certified by him or her to be correct, except as otherwise provided in this article or
31 §11-15B-1 *et seq.* of this code.

32 (f) *Accelerated payment.* --

33 (1) ~~For calendar years beginning after December 31, 2002, taxpayers~~ Taxpayers whose
34 average monthly payment of the taxes levied by this article and §11-15-1 *et seq.* of this code
35 during the previous calendar year exceeds \$100,000, shall remit the tax attributable to the first
36 fifteen days of June each year on or before June 20 of said month.

37 (2) For purposes of complying with subdivision (1) of this subsection, the taxpayer shall
38 remit an amount equal to the amount of tax imposed by this article and §11-15-1 *et seq.* of this
39 code on actual taxable sales of tangible personal property and custom software and sales of
40 taxable services during the first fifteen days of June or, at the taxpayer's election, taxpayer may
41 remit an amount equal to fifty percent of taxpayer's liability for tax under this article on taxable
42 sales of tangible personal property and custom software and sales of taxable services made
43 during the preceding month of May.

44 (3) For a business which has not been in existence for a full calendar year, the total tax
45 due from the business during the prior calendar year shall be divided by the number of months,
46 including fractions of a month, that it was in business during the prior calendar year; and if that
47 amount exceeds \$100,000, the tax attributable to the first fifteen days of June each year shall be
48 remitted on or before June 20 of said month as provided in subdivision (2) of this subsection.

49 (4) When a taxpayer required to make an advanced payment of tax under subdivision (1)
50 of this subsection makes out its return for the month of June, which is due on July 20, the taxpayer
51 may claim as a credit against its liability under this article for tax on taxable transactions during
52 the month of June, the amount of the advanced payment of tax made under subdivision (1) of this
53 subsection.

NOTE: The purpose of this bill is to level the playing field between local brick and mortar retailers in West Virginia and online retailers of digital goods, digital code, and digital services. The bill imposes the consumers sales and service tax and the use tax on digital goods, digital products and digital services as of a specified date. The bill defines terms. The bill establishes what is subject to the tax and what is exempted. The bill requires the sales of taxable digital code and digital products to be subject to certain transaction.

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