

**WEST VIRGINIA LEGISLATURE**  
**2019 FIRST EXTRAORDINARY SESSION**

**Introduced**

**Senate Bill 1002**

BY SENATORS CARMICHAEL (MR. PRESIDENT) AND

PREZIOSO

(BY REQUEST OF THE EXECUTIVE

[Introduced May 20, 2019]

1 A BILL to amend and reenact §11-21-17 and §11-21-17a of the Code of West Virginia, 1931, as  
 2 amended; to amend and reenact §11-21-37c of said code as contained in Chapter 244,  
 3 Acts of the Legislature, Regular Session, 2019; and to amend said code by adding thereto  
 4 a new section, designated §11-21-12j, all relating generally to the personal income tax;  
 5 creating additional modification to West Virginia adjusted gross income of shareholder of  
 6 S corporation, or member of a limited liability company, when engaged in business as a  
 7 financial organization in this state; setting forth apportionment rules for certain financial  
 8 organizations; specifying special gross receipts factor; defining terms; making technical  
 9 corrections; and providing retroactive effective date.

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

#### **ARTICLE 21. PERSONAL INCOME TAX.**

**§11-21-12j. Additional modification reducing federal adjusted gross income for  
 shareholders of S corporations and members of limited liability companies engaged  
 in banking business.**

1 (a) For taxable years beginning on and after January 1, 2018, the West Virginia adjusted  
 2 gross income of a taxpayer who is a shareholder of an S corporation, or member of a limited  
 3 liability company, engaged in business as a financial organization as defined in §11-24-3a(a)(14)  
 4 of this code, as adjusted pursuant to §11-21-12 of this code, shall be further adjusted by  
 5 multiplying that portion of the taxpayer's West Virginia adjusted gross income attributable to the  
 6 taxpayer's proportional share of all items of income, loss, deduction or credit of the S corporation,  
 7 or limited liability company, as shown on the K-1 received by the taxpayer for the tax year, by a  
 8 fraction equal to one minus a fraction:

9 (1) The numerator of which is the sum of the average of the monthly beginning and ending  
 10 account balances of the S corporation, or limited liability company, during the taxable year  
 11 (account balances to be determined at cost in the same manner that obligations, investments and  
 12 loans are reported on Schedule L of Federal Form 1120S, or Schedule L of Form 1065) of the

13 following:

14 (A) Obligations or securities of the United States, or of any agency, authority, commission  
15 or instrumentality of the United States and any other corporation or entity created under the  
16 authority of the United States Congress for the purpose of implementing or furthering an objective  
17 of national policy;

18 (B) Obligations or securities of this state and any political subdivision or authority of the  
19 state;

20 (C) Investments or loans primarily secured by mortgages, or deeds of trust, on residential  
21 property located in this state and occupied by nontransients; and

22 (D) Loans primarily secured by a lien or security agreement on residential property in the  
23 form of a mobile home, modular home or double-wide located in this state and occupied by  
24 nontransients.

25 (2) The denominator of which is the average of the monthly beginning and ending account  
26 balances of the total assets of the S corporation, or limited liability company, which are shown on  
27 Schedule L of Federal Form 1120S, which is filed by the S corporation, or on Schedule L of  
28 Federal Form 1065, which is filed by the limited liability company, with the Internal Revenue  
29 Service: *Provided*, That the adjustment allowed herein shall not be made to the extent that the  
30 adjustments provided for in this section are otherwise allowed by §11-21-12 of this code and shall  
31 not be made to adjusted gross income of a taxpayer who is a shareholder of an S corporation, or  
32 a member of a limited liability company, engaged in banking business if the income of the S  
33 corporation, or limited liability company, of which the taxpayer is a shareholder, or member, has  
34 been adjusted at the S corporation, or limited liability company, level for the tax year.

35 (b) *Apportionment rules for organizations engaged in business both within and without this*  
36 *state.* -- For taxable years beginning on and after January 1, 2018, an S corporation, or a limited  
37 liability company, engaged in business as a financial organization as defined in §11-24-3a(a)(14)  
38 of this code, which regularly engages in business both within and without this state shall apportion

39 the business income component of its federal taxable income, after adjustment as provided in  
 40 subsection (a) of this section, by multiplying the amount thereof by the special gross receipts  
 41 factor determined as provided in subsection (c) of this section.

42 (c) *Special gross receipts factor.* -- The gross receipts factor is a fraction, the numerator  
 43 of which is the total gross receipts of the S corporation, or limited liability company, engaged in  
 44 business as a financial organization as defined in §11-24-3a(a)(14) of this code from sources  
 45 within this state during the taxable year and the denominator of which is the total gross receipts  
 46 of the S corporation, or limited liability company, engaged in business as a financial organization  
 47 as defined in §11-24-3a(a)(14) of this code wherever earned during the taxable year: *Provided,*  
 48 That neither the numerator nor the denominator of the gross receipts factor shall include receipts  
 49 from obligations described in subsection(a) of this section.

50 (d) *Effective date.* - The provisions of this section are retroactive with respect to tax years  
 51 beginning on or after January 1, 2018, the law in effect for each of those years is fully preserved  
 52 as to those years, except as provided in this section.

**§11-21-17. Resident partners.**

1 (a) *Partner's modifications.* -- In determining West Virginia adjusted gross income and  
 2 West Virginia taxable income of a resident partner, any modification described in ~~section twelve~~  
 3 ~~(b), (c) or (d) or section fifteen (e)~~ §11-21-12(b), §11-21-12(c), §11-21-12(d), or §11-21-12j of this  
 4 code, which relates to an item of partnership income, gain, loss or deduction shall be made in  
 5 accordance with the partner's distributive share, for federal income tax purposes, of the items to  
 6 which the modifications relate. Where a partner's distributive share of any such item is not  
 7 required to be taken into account separately for federal income tax purposes, the partner's  
 8 distributive share of such item shall be his or her distributive share for federal income tax purposes  
 9 of partnership taxable income or loss generally.

10 (b) *Character of items.* -- Each item of partnership income, gain, loss, or deduction shall  
 11 have the same character for a partner under this article as for federal income tax purposes. Where

12 an item is not characterized for federal income tax purposes, it shall have the same character for  
13 a partner as if realized directly from the source from which realized by the partnership, or incurred  
14 in the same manner as incurred by the partnership.

15 (c) *West Virginia tax avoidance or evasion.* -- Where a partner's distributive share of an  
16 item of partnership income, gain, loss or deduction is determined for federal income tax purposes  
17 by special provision in the partnership agreement with respect to such item, and where the  
18 principal purpose of such provision is the avoidance or evasion of tax under this article, the  
19 partner's distributive share of such item, and any modification required with respect thereto shall  
20 be determined as if the partnership agreement made no special provision with respect to such  
21 item.

22 (d) *Partnership defined.* – For purposes of this article, “partnership” means a partnership  
23 as defined in §11-21A-1 of this code.

**§11-21-17a. Resident shareholders of S corporations.**

1 (a) S corporation shareholder's modifications. -- In determining West Virginia adjusted  
2 gross income and West Virginia taxable income of a resident S corporation shareholder, any  
3 modification described in ~~section twelve (b), (c) or (d)~~ §11-21-12(b), §11-21-12(c), §11-21-12(d),  
4 or §11-21-12j of this code, which relates to an item of income, gain, loss or deduction shall be  
5 made in accordance with the S corporation shareholder's pro rata share, for federal income tax  
6 purposes, of the items to which the modifications relate. Where a shareholder's pro rata share of  
7 any such item is not required to be taken into account separately for federal income tax purposes,  
8 the shareholder's pro rata share of such item shall be his or her pro rata share for federal income  
9 tax purposes of S corporation taxable income or loss generally.

10 (b) Character of items. -- Each item of S corporation income, gain, loss or deduction shall  
11 have the same character for a shareholder under this article as for federal income tax purposes.  
12 Where an item is not characterized for federal income tax purposes, it shall have the same  
13 character for a shareholder as if realized directly from the source from which realized by the S

14 corporation, or incurred in the same manner as incurred by the S corporation.

**§11-21-37c. Special apportionment rules - financial organizations.**

1 (a) *General.* — The Legislature hereby finds that the general formula set forth in  
2 §11-21-37a of this code for apportioning the business income of persons taxable in this state as  
3 well as in another state is inappropriate for use by financial organizations due to the particular  
4 characteristics of those organizations and the manner in which their business is conducted.  
5 Accordingly, the general formula set forth in §11-21-37a of this code may not be used to apportion  
6 the business income of financial organizations, which shall use only the apportionment formula  
7 and methods set forth in this section.

8 (b) *West Virginia financial organizations taxable in another state.* — The West Virginia  
9 taxable income of a financial organization that has its commercial domicile in this state and which  
10 is taxable in another state shall be the sum of: (1) The nonbusiness income component of its  
11 adjusted federal taxable income for the taxable year which is allocated to this state as provided  
12 §11-21-37a(d) of this code; plus (2) the business income component of its adjusted federal  
13 taxable income for the taxable year which is apportioned to this state as provided in this section.

14 (c) *Out-of-state financial organizations with business activities in this state.* — The West  
15 Virginia taxable income of a financial organization that does not have its commercial domicile in  
16 this state but which regularly engages in business in this state shall be the sum of: (1) The  
17 nonbusiness income component of its adjusted federal taxable income for the taxable year which  
18 is allocated to this state as provided in §11-21-37a(d) of this code; plus (2) the business income  
19 component of its adjusted federal taxable income for the taxable year which is apportioned to this  
20 state as provided in this section.

21 (d) *Engaging in business - nexus presumptions and exclusions.* — A financial organization  
22 that has its commercial domicile in another state is presumed to be regularly engaging in business  
23 in this state if during any year it obtains or solicits business with 20 or more persons within this  
24 state, or if the sum of the value of its gross receipts attributable to sources in this state equals or

25 exceeds \$100,000. However, gross receipts from the following types of property, as well as those  
26 contacts with this state reasonably and exclusively required to evaluate and complete the  
27 acquisition or disposition of the property, the servicing of the property or the income from it, the  
28 collection of income from the property or the acquisition or liquidation of collateral relating to the  
29 property shall not be a factor in determining whether the owner is engaging in business in this  
30 state:

31 (1) An interest in a real estate mortgage investment conduit, a real estate investment trust,  
32 or a regulated investment company;

33 (2) An interest in a loan backed security representing ownership or participation in a pool  
34 of promissory notes or certificates of interest that provide for payments in relation to payments or  
35 reasonable projections of payments on the notes or certificates;

36 (3) An interest in a loan or other asset from which the interest is attributed to a consumer  
37 loan, a commercial loan, or a secured commercial loan and in which the payment obligations were  
38 solicited and entered into by a person that is independent, and not acting on behalf, of the owner;

39 (4) An interest in the right to service or collect income from a loan or other asset from  
40 which interest on the loan is attributed as a loan described in the previous paragraph and in which  
41 the payment obligations were solicited and entered into by a person that is independent, and not  
42 acting on behalf, of the owner; or

43 (5) Any amounts held in an escrow or trust account with respect to property described  
44 above.

45 (e) *Definitions.* — For purposes of this section:

46 (1) “Commercial domicile” has same meaning as that term is defined in §11-24-3a of this  
47 code.

48 (2) “Deposit” means:

49 (A) The unpaid balance of money or its equivalent received or held by a financial  
50 organization in the usual course of business and for which it has given or it is obligated to give

51 credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift  
52 account whether or not advance notice is required to withdraw the credit funds, or which is  
53 evidenced by a certificate of deposit, thrift certificate, investment certificate, or certificate of  
54 indebtedness, or other similar name, or a check or draft drawn against a deposit account and  
55 certified by the financial organization, or a letter of credit or a traveler's check on which the  
56 financial organization is primarily liable: *Provided*, That without limiting the generality of the term  
57 "money or its equivalent", any account or instrument must be regarded as evidencing the receipt  
58 of the equivalent of money when credited or issued in exchange for checks or drafts or for a  
59 promissory note upon which the person obtaining any credit or instrument is primarily or  
60 secondarily liable or for a charge against a deposit account or in settlement of checks, drafts or  
61 other instruments forwarded to the bank for collection;

62 (B) Trust funds received or held by the financial organization, whether held in the trust  
63 department or held or deposited in any other department of the financial organization;

64 (C) Money received or held by a financial organization or the credit given for money or its  
65 equivalent received or held by a financial organization in the usual course of business for a special  
66 or specific purpose, regardless of the legal relationship thereby established, including, without  
67 being limited to, escrow funds, funds held as security for an obligation due the financial  
68 organization or other, including funds held as dealers' reserves or for securities loaned by the  
69 financial organization, funds deposited by a debtor to meet maturing obligations, funds deposited  
70 as advance payment on subscriptions to United States government securities, funds held for  
71 distribution or purchase of securities, funds held to meet its acceptances or letters of credit, and  
72 withheld taxes: *Provided*, That there may not be included funds which are received by the financial  
73 organization for immediate application to the reduction of an indebtedness to the receiving  
74 financial organization, or under condition that the receipt thereof immediately reduces or  
75 extinguishes an indebtedness;

76 (D) Outstanding drafts, including advice or authorization to charge a financial

77 organization's balance in another organization, cashier's checks, money orders or other officer's  
78 checks issued in the usual course of business for any purpose, but not including those issued in  
79 payment for services, dividends, or purchases or other costs or expenses of the financial  
80 organization itself; and

81 (E) Money or its equivalent held as a credit balance by a financial organization on behalf  
82 of its customer if the entity is engaged in soliciting and holding balances in the regular course of  
83 its business.

84 (3) "Financial organization" has the same meaning as that term is defined in §11-21-3a of  
85 this code.

86 (4) "Sales" means, for purposes of apportionment under this section, the gross receipts of  
87 a financial organization included in the gross receipts factor described in subsection (g) of this  
88 section, regardless of their source.

89 (f) *Apportionment rules.* — A financial organization which regularly engages in business  
90 both within and without this state shall apportion the business income component of its federal  
91 taxable income, after adjustment as provided in ~~§11-24-6~~ §11-21-12j of this code, by multiplying  
92 the amount thereof by the special gross receipts factor determined as provided in subsection (g)  
93 of this section.

94 (g) *Special gross receipts factor.* — The gross receipts factor is a fraction, the numerator  
95 of which is the total gross receipts of the taxpayer from sources within this state during the taxable  
96 year and the denominator of which is the total gross receipts of the taxpayer wherever earned  
97 during the taxable year: *Provided*, That neither the numerator nor the denominator of the gross  
98 receipts factor shall include receipts from obligations described in ~~§11-24-6(f)(1)(A), (B), (C), and~~  
99 ~~(D)~~ §11-21-12j(1)(A), (B), (C), and (D) of this code.

100 (1) *Numerator.* — The numerator of the gross receipts factor shall include, in addition to  
101 items otherwise includable in the sales factor under §11-21-37a of this code, the following:

102 (A) Receipts from the lease or rental of real or tangible personal property whether as the

103 economic equivalent of an extension of credit or otherwise if the property is located in this state;

104 (B) Interest income and other receipts from assets in the nature of loans which are secured  
105 primarily by real estate or tangible personal property if the security property is located in the state.

106 If the security property is also located in one or more other states, receipts are presumed to be  
107 from sources within this state, subject to rebuttal based upon factors described in rules to be  
108 proposed by the Tax Commissioner, including the factor that the proceeds of any loans were  
109 applied and used by the borrower entirely outside of this state;

110 (C) Interest income and other receipts from consumer loans which are unsecured or are  
111 secured by intangible property that are made to residents of this state, whether at a place of  
112 business, by traveling loan officer, by mail, by telephone or other electronic means or otherwise;

113 (D) Interest income and other receipts from commercial loans and installment obligations  
114 which are unsecured or are secured by intangible property if and to the extent that the borrower  
115 or debtor is a resident of or is domiciled in this state: *Provided*, That receipts are presumed to be  
116 from sources in this state and the presumption may be overcome by reference to factors described  
117 in rules to be proposed by the Tax Commissioner, including the factor that the proceeds of any  
118 loans were applied and used by the borrower entirely outside of this state;

119 (E) Interest income and other receipts from a financial organization's syndication and  
120 participation in loans, under the rules set forth in paragraphs (A) through (D), inclusive, of this  
121 subdivision;

122 (F) Interest income and other receipts, including service charges, from financial institution  
123 credit card and travel and entertainment credit card receivables and credit card holders' fees if  
124 the borrower or debtor is a resident of this state or if the billings for any receipts are regularly sent  
125 to an address in this state;

126 (G) Merchant discount income derived from financial institution credit card holder  
127 transactions with a merchant located in this state. When merchants are located within and without  
128 this state, only receipts from merchant discounts attributable to sales made from locations within

129 this state shall be attributed to this state. It shall be presumed, subject to rebuttal, that the location  
130 of a merchant is the address shown on the invoice submitted by the merchant to the taxpayer;

131 (H) Gross receipts from the performance of services are attributed to this state if:

132 (i) The service receipts are loan-related fees, including loan servicing fees, and the  
133 borrower resides in this state, except that, at the taxpayer's election, receipts from loan-related  
134 fees which are either: (I) "Pooled" or aggregated for collective financial accounting treatment; or  
135 (II) manually written as nonrecurring extraordinary charges to be processed directly to the general  
136 ledger may either be attributed to a state based upon the borrowers' residences or upon the ratio  
137 that total interest sourced to that state bears to total interest from all sources;

138 (ii) The service receipts are deposit-related fees and the depositor resides in this state,  
139 except that, at the taxpayer's election, receipts from deposit-related fees which are either: (I)  
140 "Pooled" or aggregated for collective financial accounting treatment; or (II) manually written as  
141 nonrecurring extraordinary charges to be processed directly to the general ledger may either be  
142 attributed to a state based upon the depositors' residences or upon the ratio that total deposits  
143 sourced to that state bears to total deposits from all sources;

144 (iii) The service receipt is a brokerage fee and the account holder is a resident of this state;

145 (iv) The service receipts are fees related to estate or trust services and the estate's  
146 decedent was a resident of this state immediately before death or the grantor who either funded  
147 or established the trust is a resident of this state; or

148 (v) The service receipt is associated with the performance of any other service not  
149 identified above and the service is performed for an individual resident of, or for a corporation or  
150 other business domiciled in, this state and the economic benefit of service is received in this state;

151 (I) Gross receipts from the issuance of travelers' checks and money orders if the checks  
152 and money orders are purchased in this state; and

153 (J) All other receipts not attributed by this rule to a state in which the taxpayer is taxable  
154 shall be attributed pursuant to the laws of the state of the taxpayer's commercial domicile.

155           (2) *Denominator.* — The denominator of the gross receipts factor shall include all of the  
156 taxpayer's gross receipts from transactions of the kind included in the numerator, but without  
157 regard to their source or situs.

158           (h) *Effective date.* — The provisions of this section enacted in 2019 shall apply to all  
159 taxable years beginning on or after January 1, 2018.

NOTE: The purpose of this bill is to provide a reducing modification to the West Virginia adjusted gross income of a shareholder of a Subchapter S corporation, or member of a limited liability company, engaged in banking business in this state and making the modification retroactive with respect to tax years beginning on or after January 1, 2018.

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