

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

Senate Bill 477

**FISCAL
NOTE**

BY SENATOR BLAIR

[Introduced January 30, 2019; Referred
to the Committee on Finance]

1 A BILL to amend and reenact §11-15A-1 of the Code of West Virginia, 1931, as amended; and to
 2 amend said code by adding thereto a new section, designated §11-15A-6b, all relating
 3 generally to collection of use tax; defining terms; requiring collection of use tax by
 4 marketplace facilitators and referrers satisfying certain economic nexus requirements; and
 5 specifying internal effective date.

Be it enacted by the Legislature of West Virginia:

ARTICLE 15A. USE TAX.

§11-15A-1. Definitions.

1 (a) *General.* -- When used in this article and article fifteen of this chapter, terms 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) "Affiliated person" means a person that, with respect to another person:

7 (A) Has an ownership interest of more than five percent, whether direct or indirect, in the
 8 other person; or

9 (B) Is related to the other person because a third person, or group of third persons who
 10 are affiliated persons with respect to each other, holds an ownership interest of more than five
 11 percent, whether direct or indirect, in the related persons.

12 (2) "Business" means any activity engaged in by any person, or caused to be engaged in
 13 by any person, with the object of direct or indirect economic gain, benefit or advantage, and
 14 includes any purposeful revenue generating activity in this state;

15 (3) "Consumer" means any person purchasing tangible personal property, custom software or a
 16 taxable service from a retailer as defined in ~~paragraph (7) of this subsection~~ §11-15A-1(b)(22),
 17 or from a seller as defined in §11-15B-2 of this code;

18 (4) "Electronic" means relating to technology having electrical, digital, magnetic, wireless,
19 optical, electromagnetic or similar capabilities.

20 (5) "Fiat currency" means government-issued currency that is designated as legal tender
21 in its country of issuance through government decree, regulation, or law;

22 ~~(3)~~ (6) "Lease" includes rental, hire and license;

23 (7) "Marketplace" includes any means by which any marketplace seller sells or offers for
24 sale tangible personal property, or services, for delivery into this state, regardless of whether the
25 marketplace seller has a physical presence in this state.

26 (8) "Marketplace facilitator" means a person that contracts with one or more sellers to
27 facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale
28 of the seller's products through a physical or electronic marketplace operated by the person, and
29 engages:

30 (A) Directly, or indirectly, through one or more affiliated persons, in any of the following:

31 (i) Transmitting or otherwise communicating the offer or acceptance between the buyer
32 and seller;

33 (ii) Owning or operating the infrastructure, electronic or physical, or technology that brings
34 buyers and sellers together;

35 (iii) Providing a virtual currency that buyers are allowed or required to use to purchase
36 products from the seller; or

37 (iv) Software development or research and development activities related to any of the
38 activities described in §11-15A-1(b)(7)(B) of this code, if such activities are directly related to a
39 physical or electronic marketplace operated by the person or an affiliated person; and

40 (B) In any of the following activities with respect to the seller's products:

41 (i) Payment processing services;

42 (ii) Fulfillment or storage services;

43 (iii) Listing products for sale;

44 (iv) Setting prices;

45 (v) Branding sales as those of the marketplace facilitator;

46 (vi) Order taking;

47 (vii) Advertising or promotion; or

48 (viii) Providing customer service or accepting or assisting with returns or exchanges.

49 (9) "Marketplace seller" means a seller that makes retail sales through any physical or
50 electronic marketplaces operated by a marketplace facilitator or directly resulting from a referral
51 by a referrer, regardless of whether the seller is required to be registered with the Tax
52 Commissioner as provided in §11-12-1 et seq. of this code.

53 (10) "Newspaper" means a paper that is printed and distributed usually daily or weekly
54 and that contains news, articles of opinion, features, and advertising.

55 ~~(4)~~ (11) "Person" includes any individual, firm, partnership, joint venture, joint stock
56 company, association, public or private corporation, limited liability company, limited liability
57 partnership, cooperative, estate, trust, business trust, receiver, executor, administrator, any other
58 fiduciary, any representative appointed by order of any court or otherwise acting on behalf of
59 others, or any other group or combination acting as a unit, and the plural as well as the singular
60 number;

61 (12) "Platform" means an electronic or physical medium, including, but not limited to, a
62 website or catalog, operated by a referrer.

63 (13) "Product" has the same meaning as provided in §11-15B-15 of this code.

64 ~~(5)~~ (14) "Purchase" means any transfer, exchange or barter, conditional or otherwise, in
65 any manner or by any means whatsoever, for a consideration;

66 ~~(6)~~ (15) "Purchase price" means the measure subject to the tax imposed by this article
67 and has the same meaning as sales price;

68 (16) "Purchaser" means any consumer who purchases or leases a product or service
69 sourced to this state under §11-15B-1 et seq. of this code.

70 (17) "Referral" means the transfer by a referrer of a potential customer to a marketplace
71 seller who advertises or lists products for sale on the referrer's platform.

72 (18) (A) "Referrer" means a person, other than a person engaging in the business of
73 printing a newspaper or publishing a newspaper as defined in §11-15A-1(b)(1) of this code, who
74 contracts or otherwise agrees with a seller to list or advertise for sale one or more items in any
75 medium, including a web site or catalog; receives a commission, fee, or other consideration from
76 the seller for the listing or advertisement; transfers, via telephone, internet link, or other means, a
77 purchaser to a seller or an affiliated person to complete the sale; and does not collect receipts
78 from the purchasers for the transaction.

79 (B) "Referrer" does not include a person that:

80 (i) Provides internet advertising services; and

81 (ii) Does not ever provide either the marketplace seller's shipping terms or advertise
82 whether a marketplace seller charges sales and use taxes.

83 (19) "Related person" has the same meaning prescribed by section 267 or 707 (b) of the
84 Internal Revenue Code, as defined in §11-21-9 of this code.

85 (20) "Remote seller" means any seller, other than a marketplace facilitator or referrer, who
86 does not have a physical presence in this state that, through a forum, sells tangible personal
87 property or services to persons in this state, the sale or use of which is subject to the tax imposed
88 by this article. The term does not include an employee who in the ordinary scope of employment
89 renders services to his or her employer in exchange for wages and salaries.

90 (21) "Resident" means any person that resides, is located, has a place of business, or is
91 conducting business in West Virginia;

92 (22) "Retail sale" and "sale" have the same meaning as provided §11-15B-1 et seq. of this
93 code.

94 (23) "Retailer" means and includes every person engaging in the business of selling,
95 leasing or renting tangible personal property or custom software or furnishing a taxable service

96 for use within the meaning of this article, or in the business of selling, at auction, tangible personal
97 property or custom software owned by the person or others for use in this state: *Provided*, That
98 when in the opinion of the Tax Commissioner it is necessary for the efficient administration of this
99 article to regard any salespersons, representatives, truckers, peddlers or canvassers as the
100 agents of the dealers, distributors, supervisors, employees or persons under whom they operate
101 or from whom they obtain the tangible personal property sold by them, irrespective of whether
102 they are making sales on their own behalf or on behalf of the dealers, distributors, supervisors,
103 employers or persons, the Tax Commissioner may so regard them and may regard the dealers,
104 distributors, supervisors, employers, or persons as retailers for purposes of this article;

105 ~~(8)~~ (24) "Retailer engaging in business in this state" or any like term, unless otherwise
106 limited by federal statute, means and includes, but is not limited to:

107 (A) Any retailer having or maintaining, occupying or using, within this state, directly or by
108 a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or
109 any agent (by whatever name called) operating within this state under the authority of the retailer
110 or its subsidiary, irrespective of whether the place of business or agent is located here
111 permanently or temporarily, or whether the retailer or subsidiary is admitted to do business within
112 this state pursuant to §31D-15-1 *et seq.* of this code or §31E-14-1 *et seq.* of this code; or

113 (B) On and after January 1, 2014, any retailer that is related to, or part of a unitary business
114 with, a person, entity or business that, without regard to whether the retailer is admitted to do
115 business in this state pursuant to §31D-15-1 *et seq.* of this code or §31E-14-1 *et seq.* of this
116 code, is a subsidiary of the retailer, or is related to, or unitary with, the retailer as a related entity,
117 a related member or part of a unitary business, all as defined in §11-24-3a of this code;

118 (i) That, pursuant to an agreement with or in cooperation with the related retailer, maintains
119 an office, distribution house, sales house, warehouse or other place of business in this state;

120 (ii) That performs services in this state in connection with tangible personal property or
121 services sold by the retailer, or any related entity, related member or part of the unitary business;

122 (iii) That, by any agent, or representative (by whatever name called), or employee,
123 performs services in this state in connection with tangible personal property or services sold by
124 the retailer, or any related entity, related member or part of the unitary business; or

125 (iv) That directly, or through or by an agent, representative or employee located in, or
126 present in, this state, solicits business in this state for or on behalf of the retailer, or any related
127 entity, related member or part of the unitary business.

128 (C) For purposes of paragraph (B) of this subdivision, the term "service" means and
129 includes, but is not limited to, customer support services, help desk services, call center services,
130 repair services, engineering services, installation service, assembly service, delivery service by
131 means other than common carrier or the United States Postal Service, technical assistance
132 services, the service of investigating, handling or otherwise assisting in resolving customer issues
133 or complaints while in this state, the service of operating a mail order business or telephone,
134 Internet or other remote order business from facilities located within this state, the service of
135 operating a website or Internet-based business from a location within the state, or any other
136 service.

137 ~~(9)~~ (25) "Sale" means any transaction resulting in the purchase or lease of tangible
138 personal property, custom software or a taxable service from a retailer;

139 ~~(40)~~ (26) "Seller" means a retailer, and includes every person selling or leasing tangible
140 personal property or custom software or furnishing a taxable service in a transaction that is subject
141 to the tax imposed by this article;

142 (27) "Solicitor" means a person that directly or indirectly solicits business for a retailer.

143 ~~(44)~~ (28) "Streamlined sales and use tax agreement" or "agreement," when used in this
144 article, has the same meaning as when used in §11-15B-1 *et seq.*, except when the context in
145 which the word agreement is used clearly indicates that a different meaning is intended by the
146 Legislature;

147 ~~(42)~~ (29) "Tangible personal property" means personal property that can be seen,

148 weighed, measured, felt, or touched, or that is in any manner perceptible to the senses. "Tangible
149 personal property" includes, but is not limited to, electricity, water, gas, and prewritten computer
150 software;

151 ~~(43)~~ (30) "Tax commissioner" or "commissioner" means the State Tax Commissioner, or
152 his or her delegate. The term "delegate" in the phrase "or his or her delegate," when used in
153 reference to the Tax Commissioner, means any officer or employee of the State Tax Division duly
154 authorized by the Tax Commissioner directly, or indirectly by one or more redelegations of
155 authority, to perform the functions mentioned or described in this article or rules promulgated for
156 this article;

157 (44) (31) "Taxpayer" includes any person within the meaning of this section, who is subject
158 to a tax imposed by this article, whether acting for himself or herself or as a fiduciary; and

159 ~~(45)~~ (32) "Use" means and includes:

160 (A) The exercise by any person of any right or power over tangible personal property or
161 custom software incident to the ownership, possession or enjoyment of the property, or by any
162 transaction in which possession of or the exercise of any right or power over tangible personal
163 property, custom software or the result of a taxable service is acquired for a consideration,
164 including any lease, rental or conditional sale of tangible personal property or custom software;
165 or

166 (B) The use or enjoyment in this state of the result of a taxable service. As used in this
167 subdivision, "enjoyment" includes a purchaser's right to direct the disposition of the property or
168 the use of the taxable service, whether or not the purchaser has possession of the property.

169 The term "use" does not include the keeping, retaining or exercising any right or power
170 over tangible personal property, custom software or the result of a taxable service for the purpose
171 of subsequently transporting it outside the state for use thereafter solely outside this state.

172 (33)(A) "Virtual currency" means any type of digital unit that is used as a medium of
173 exchange or a form of digitally stored value. "Virtual currency" shall be broadly construed to

174 include digital units of exchange that (i) have a centralized repository or administrator; (ii) are
175 decentralized and have no centralized repository or administrator; or (iii) may be created or
176 obtained by computing or manufacturing effort.

177 (B) "Virtual currency" shall not be construed to include any of the following:

178 (i) Digital units that (I) are used solely within online gaming platforms, (II) have no market
179 or application outside of those gaming platforms, (III) cannot be converted into, or redeemed for,
180 Fiat Currency or Virtual Currency, and (IV) may or may not be redeemable for real-world goods,
181 services, discounts, or purchases.

182 (ii) Digital units that can be redeemed for goods, services, discounts, or purchases as part
183 of a customer affinity or rewards program with the issuer and/or other designated merchants or
184 can be redeemed for digital units in another customer affinity or rewards program, but cannot be
185 converted into, or redeemed for, fiat currency or virtual currency; or

186 (iii) Digital units used as part of prepaid cards.

187 (34) "West Virginia gross revenue" means gross receipts from all sales sourced to West
188 Virginia, as provided in §11-15B-1 et seq. of this code, whether the sale is taxable or exempt from
189 tax.

190 (c) *Additional definitions.* -- Other terms used in this article are defined in articles fifteen
191 and fifteen-b of this chapter, which definitions are incorporated by reference into article fifteen-a.
192 Additionally, other sections of this article may define terms primarily used in the section in which
193 the term is defined.

§11-15A-6b. Collection of tax by marketplace facilitators and referrers.

1 (a) *Duty to collect tax.* - For purposes of §11-15A-1 et seq. of this code and for collection
2 of use tax required under §11-15A-6 and §11015A-6b of this code, the phrase retailer engaging
3 in business in this state also means and includes a marketplace facilitator or referrer.

4 (b) *Agency.* - For purposes of §11-15A-6b of this code, a marketplace facilitator or referrer
5 is deemed to be an agent of any marketplace seller making retail sales through the marketplace

6 facilitator's physical or electronic marketplace or directly resulting from a referral of the purchaser
7 by the referrer.

8 (c) Sales made through a solicitor in this state. - A retailer is deemed to have a solicitor in
9 this state if the retailer enters into an agreement with a resident under which the resident, for a
10 commission, fee, or other similar consideration, directly or indirectly refers potential customers,
11 whether by link on an internet site, or otherwise, to the retailer. This determination may be rebutted
12 by a showing of proof that the resident with whom the retailer has an agreement did not engage
13 in any solicitation in this state on behalf of the retailer that would satisfy the nexus requirement of
14 the United States Constitution during the calendar year in question.

15 (d) Record keeping. - In addition to other applicable record keeping requirements, the Tax
16 Commissioner may require a marketplace facilitator or referrer to provide or make available to the
17 Tax Commissioner any information the Commissioner determines is reasonably necessary to
18 enforce the provisions of §11-15A-1 et seq. of this code. Such information may include
19 documentation of sales made by marketplace sellers through the marketplace facilitator's physical
20 or electronic marketplace or directly resulting from a referral by the referrer. The Tax
21 Commissioner may prescribe by procedural rule promulgate, as provided in §29A-3-1 et seq. of
22 this code, the form and manner for providing this information.

23 (e) Economic nexus. - A marketplace facilitator, referrer, or retailer, who does not have a
24 physical presence in this state, shall collect the tax imposed by §11-15A-2 of the code when:

25 (1) The seller that has gross revenue from West Virginia sales equal to or exceeding
26 \$100,000 for an immediately preceding calendar year, or a current calendar year; or

27 (2) The seller makes West Virginia sales in 200 or more separate transactions for an
28 immediately preceding calendar year or a current calendar year.

29 (f) Effective date. – This section enacted in 2019 shall apply to sales by a marketplace
30 facilitator, or referrer, made on and after July 1, 2019.

NOTE: The purpose of this bill is to require out-of-state retailers that do not have a physical

presence in this state and who have not voluntarily agreed to collect West Virginia use tax but have economic nexus with this State, as defined in this bill, to begin collecting West Virginia state and municipal sales and use taxes on sales to consumers in this State.

Marketplace facilitators are treated as **OUT OF STATE** retailers and are subjected to the tax collection and remittance requirements of the provision. A marketplace facilitator in essence contracts with third party sellers to promote their sale of physical property, digital goods, and services through the marketplace.

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