

1 **Senate Bill No. 329**

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

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5 [Introduced January 27, 2011; referred to the Committee on
6 Finance.]
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11 A BILL to amend and reenact §11-15B-2, §11-15B-2a, §11-15B-24 and
12 §11-15B-32 of the Code of West Virginia, 1931, as amended, all
13 relating to the administration of sales and use tax generally;
14 adding new definitions; clarifying present definitions;
15 incorporating changes to the Streamlined Sales and Use Tax
16 Agreement; adding a computer software maintenance contract as
17 a Streamlined Sales and Use Tax Agreement defined term;
18 relieving seller of tax liability in certain instances; and
19 providing new effective dates.

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

21 That §11-15B-2, §11-15B-2a, §11-15B-24 and §11-15B-32 of the
22 Code of West Virginia, 1931, as amended, be amended and reenacted,
23 all to read as follows:

24 **ARTICLE 15B. SALES AND USE TAX ADMINISTRATION.**

25 **§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) of
3 this section shall have the meanings ascribed to them in this
4 section, except where a different meaning is distinctly expressed
5 or the context in which the term is used clearly indicates that a
6 different meaning is intended by the Legislature.

7 (b) *Terms defined.* --

8 (1) "Agent" means a person appointed by a seller to represent
9 the seller before the member states.

10 (2) "Agreement" means the Streamlined Sales and Use Tax
11 Agreement as defined in section two-a of this article.

12 (3) "Alcoholic beverages" means beverages that are suitable
13 for human consumption and contain one half of one percent or more
14 of alcohol by volume.

15 (4) "Bundled transaction" means the retail sale of two or more
16 products, except real property and services to real property,
17 where: (i) The products are otherwise distinct and identifiable;
18 and (ii) the products are sold for one nonitemized price. A
19 "bundled transaction" does not include the sale of any products in
20 which the "sales price" varies, or is negotiable, based on the
21 selection by the purchaser of the products included in the
22 transaction.

23 (A) "Distinct and identifiable products" does not include:

24 (i) Packaging such as containers, boxes, sacks, bags and
25 bottles or other materials such as wrapping, labels, tags and

1 instruction guides that accompany the "retail sale" of the products
2 and are incidental or immaterial to the "retail sale" thereof.
3 Examples of packaging that are incidental or immaterial include
4 grocery sacks, shoe boxes, dry cleaning garment bags and express
5 delivery envelopes and boxes;

6 (ii) A product provided free of charge with the required
7 purchase of another product. A product is "provided free of charge"
8 if the "sales price" of the product purchased does not vary
9 depending on the inclusion of the product "provided free of
10 charge"; or

11 (iii) Items included in the member state's definition of
12 "sales price" as defined in this section.

13 (B) The term "one nonitemized price" does not include a price
14 that is separately identified by product on binding sales or other
15 supporting sales-related documentation made available to the
16 customer in paper or electronic form including, but not limited to,
17 an invoice, bill of sale, receipt, contract, service agreement,
18 lease agreement, periodic notice of rates and services, rate card
19 or price list.

20 (C) A transaction that otherwise meets the definition of a
21 "bundled transaction", as defined in this subdivision, is not a
22 "bundled transaction" if it is:

23 (i) The "retail sale" of tangible personal property and a
24 service where the tangible personal property is essential to the
25 use of the service and is provided exclusively in connection with

1 the service and the true object of the transaction is the service;
2 or

3 (ii) The "retail sale" of services where one service is
4 provided that is essential to the use or receipt of a second
5 service and the first service is provided exclusively in connection
6 with the second service and the true object of the transaction is
7 the second service; or

8 (iii) A transaction that includes taxable products and
9 nontaxable products and the "purchase price" or "sales price" of
10 the taxable products is de minimis;

11 (I) "De minimis" means the seller's "purchase price" or "sales
12 price" of the taxable products is ten percent or less of the total
13 "purchase price" or "sales price" of the bundled products;

14 (II) Sellers shall use either the "purchase price" or the
15 "sales price" of the products to determine if the taxable products
16 are de minimis. Sellers may not use a combination of the "purchase
17 price" and "sales price" of the products to determine if the
18 taxable products are de minimis;

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

21 (iv) A transaction that includes products taxable at the
22 general rate of tax and food or food ingredients taxable at a lower
23 rate of tax and the "purchase price" or "sales price" of the
24 products taxable at the general sales tax rate is de minimis. For
25 purposes of this subparagraph, the term "de minimis" has the same

1 meaning as ascribed to it under subparagraph (iii) of this
2 paragraph;

3 (v) The "retail sale" of exempt tangible personal property, or
4 food and food ingredients taxable at a lower rate of tax, and
5 tangible personal property taxable at the general rate of tax
6 where:

7 (I) The transaction includes "food and food ingredients",
8 "drugs", "durable medical equipment", "mobility-enhancing
9 equipment", "over-the-counter drugs", "prosthetic devices" or
10 medical supplies, all as defined in this article; and

11 (II) Where the seller's "purchase price" or "sales price" of
12 the taxable tangible personal property taxable at the general rate
13 of tax is fifty percent or less of the total "purchase price" or
14 "sales price" of the bundled tangible personal property. Sellers
15 may not use a combination of the "purchase price" and "sales price"
16 of the tangible personal property when making the fifty percent
17 determination for a transaction.

18 (5) "Candy" means a preparation of sugar, honey or other
19 natural or artificial sweeteners in combination with chocolate,
20 fruits, nuts or other ingredients or flavorings in the form of
21 bars, drops or pieces. "Candy" shall not include any preparation
22 containing flour and shall require no refrigeration.

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

- 1 (A) "Clothing" shall include:
- 2 (i) Aprons, household and shop;
- 3 (ii) Athletic supporters;
- 4 (iii) Baby receiving blankets;
- 5 (iv) Bathing suits and caps;
- 6 (v) Beach capes and coats;
- 7 (vi) Belts and suspenders;
- 8 (vii) Boots;
- 9 (viii) Coats and jackets;
- 10 (ix) Costumes;
- 11 (x) Diapers, children and adult, including disposable diapers;
- 12 (xi) Ear muffs;
- 13 (xii) Footlets;
- 14 (xiii) Formal wear;
- 15 (xiv) Garters and garter belts;
- 16 (xv) Girdles;
- 17 (xvi) Gloves and mittens for general use;
- 18 (xvii) Hats and caps;
- 19 (xviii) Hosiery;
- 20 (xix) Insoles for shoes;
- 21 (xx) Lab coats;
- 22 (xxi) Neckties;
- 23 (xxii) Overshoes;
- 24 (xxiii) Pantyhose;
- 25 (xxiv) Rainwear;

1 (xxv) Rubber pants;
2 (xxvi) Sandals;
3 (xxvii) Scarves;
4 (xxviii) Shoes and shoe laces;
5 (xxix) Slippers;
6 (xxx) Sneakers;
7 (xxxi) Socks and stockings;
8 (xxxii) Steel-toed shoes;
9 (xxxiii) Underwear;
10 (xxxiv) Uniforms, athletic and nonathletic; and
11 (xxxv) Wedding apparel.
12 (B) "Clothing" shall not include:
13 (i) Belt buckles sold separately;
14 (ii) Costume masks sold separately;
15 (iii) Patches and emblems sold separately;
16 (iv) Sewing equipment and supplies, including, but not limited
17 to, knitting needles, patterns, pins, scissors, sewing machines,
18 sewing needles, tape measures and thimbles; and
19 (v) Sewing materials that become part of "clothing" including,
20 but not limited to, buttons, fabric, lace, thread, yarn and
21 zippers.
22 (7) "Clothing accessories or equipment" means incidental items
23 worn on the person or in conjunction with "clothing". "Clothing
24 accessories or equipment" are mutually exclusive of and may be
25 taxed differently than apparel within the definition of "clothing",

1 "sport or recreational equipment" and "protective equipment". The
2 following list contains examples and is not intended to be an all-
3 inclusive list. "Clothing accessories or equipment" shall include:

4 (A) Briefcases;

5 (B) Cosmetics;

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

8 (D) Handbags;

9 (E) Handkerchiefs;

10 (F) Jewelry;

11 (G) Sunglasses, nonprescription;

12 (H) Umbrellas;

13 (I) Wallets;

14 (J) Watches; and

15 (K) Wigs and hair pieces.

16 (8) "Certified automated system" or "CAS" means software
17 certified under the agreement to calculate the tax imposed by each
18 jurisdiction on a transaction, determine the amount of tax to remit
19 to the appropriate state and maintain a record of the transaction.

20 (9) "Certified service provider" or "CSP" means an agent
21 certified under the agreement to perform all of the seller's sales
22 and use tax functions other than the seller's obligation to remit
23 tax on its own purchases.

24 (10) "Computer" means an electronic device that accepts
25 information in digital or similar form and manipulates the

1 information for a result based on a sequence of instructions.

2 (11) "Computer software" means a set of coded instructions
3 designed to cause a "computer" or automatic data processing
4 equipment to perform a task.

5 (12) "Computer software maintenance contract" is a contract
6 that obligates a vendor of computer software, or other person, to
7 provide a customer with future updates or upgrades to computer
8 software, support services with respect to computer software or
9 both. The term "computer software maintenance contract" includes
10 contracts sold by a person other than the vendor of the computer
11 software to which the contract relates.

12 (A) A "mandatory computer software maintenance contract" is a
13 computer software maintenance contract that the customer is
14 obligated by contract to purchase as a condition to the retail sale
15 of computer software.

16 (B) An "optional computer maintenance contract" is a computer
17 software maintenance contract that a customer is not obligated to
18 purchase as a condition to the retail sale of computer software.

19 (13) "Delivered electronically" means delivered to the
20 purchaser by means other than tangible storage media.

21 ~~(12)~~ (14) "Delivery charges" means charges by the seller of
22 personal property or services for preparation and delivery to a
23 location designated by the purchaser of personal property or
24 services including, but not limited to, transportation, shipping,
25 postage, handling, crating and packing.

1 ~~(13)~~ (15) "Dietary supplement" means any product, other than
2 "tobacco", intended to supplement the diet that:

3 (A) Contains one or more of the following dietary ingredients:

4 (i) A vitamin;

5 (ii) A mineral;

6 (iii) An herb or other botanical;

7 (iv) An amino acid;

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

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

13 (B) And is intended for ingestion in tablet, capsule, powder,
14 softgel, gelcap or liquid form, or if not intended for ingestion in
15 such a form, is not represented as conventional food and is not
16 represented for use as a sole item of a meal or of the diet; and

17 (C) Is required to be labeled as a dietary supplement,
18 identifiable by the "Supplemental Facts" box found on the label as
19 required pursuant to 21 CFR § 101.36 or in any successor section of
20 the Code of Federal Regulations.

21 ~~(14)~~ (16) "Direct mail" means printed material delivered or
22 distributed by United States mail or other delivery service to a
23 mass audience or to addressees on a mailing list provided by the
24 purchaser or at the direction of the purchaser when the cost of the
25 items are not billed directly to the recipients. "Direct mail"

1 includes tangible personal property supplied directly or indirectly
2 by the purchaser to the direct mail seller for inclusion in the
3 package containing the printed material. "Direct mail" does not
4 include multiple items of printed material delivered to a single
5 address.

6 ~~(15)~~ (17) "Drug" means a compound, substance or preparation,
7 and any component of a compound, substance or preparation, other
8 than food and food ingredients, dietary supplements or alcoholic
9 beverages:

10 (A) Recognized in the official United States Pharmacopoeia,
11 official Homeopathic Pharmacopoeia of the United States or official
12 National Formulary, and supplement to any of them;

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

15 (C) Intended to affect the structure or any function of the
16 body. The amendment to this subdivision enacted during the 2009
17 regular legislative session shall apply to sales made after July 1,
18 2009.

19 ~~(16)~~ (18) "Durable medical equipment" means equipment,
20 including repair and replacement parts for the equipment, but does
21 not include "mobility-enhancing equipment", which:

22 (A) Can withstand repeated use;

23 (B) Is primarily and customarily used to serve a medical
24 purpose;

25 (C) Generally is not useful to a person in the absence of

1 illness or injury; and

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

3 ~~(17)~~ (19) "Electronic" means relating to technology having
4 electrical, digital, magnetic, wireless, optical, electromagnetic
5 or similar capabilities.

6 ~~(18)~~ (20) "Eligible property" means an item of a type, such as
7 clothing, that qualifies for a sales tax holiday exemption in this
8 state.

9 ~~(19)~~ (21) "Energy Star qualified product" means a product that
10 meets the energy efficient guidelines set by the United States
11 Environmental Protection Agency and the United States Department of
12 Energy that are authorized to carry the Energy Star label. Covered
13 products are those listed at www.energystar.gov or successor
14 address.

15 ~~(20)~~ (22) "Entity-based exemption" means an exemption based on
16 who purchases the product or service or who sells the product or
17 service. An exemption that is available to all individuals shall
18 not be considered an entity-based exemption.

19 ~~(21)~~ (23) "Food and food ingredients" means substances,
20 whether in liquid, concentrated, solid, frozen, dried or dehydrated
21 form, that are sold for ingestion or chewing by humans and are
22 consumed for their taste or nutritional value. "Food and food
23 ingredients" does not include alcoholic beverages, prepared food or
24 tobacco.

25 ~~(22)~~ (24) "Food sold through vending machines" means food

1 dispensed from a machine or other mechanical device that accepts
2 payment.

3 ~~(23)~~ (25) "Fur clothing" means "clothing" that is required to
4 be labeled as a fur product under the Federal Fur Products Labeling
5 Act (15 U.S.C. §69) and the value of the fur components in the
6 product is more than three times the value of the next most
7 valuable tangible component. "Fur clothing" is human-wearing
8 apparel suitable for general use but may be taxed differently from
9 "clothing". For the purposes of the definition of "fur clothing",
10 the term "fur" means any animal skin or part thereof with hair,
11 fleece or fur fibers attached thereto, either in its raw or
12 processed state, but shall not include such skins that have been
13 converted into leather or suede, or which in processing the hair,
14 fleece or fur fiber has been completely removed.

15 ~~(24)~~ (26) "Governing board" means the governing board of the
16 Streamlined Sales and Use Tax Agreement.

17 ~~(25)~~ (27) "Grooming and hygiene products" are soaps and
18 cleaning solutions, shampoo, toothpaste, mouthwash, antiperspirants
19 and sun tan lotions and screens, regardless of whether the items
20 meet the definition of "over-the-counter drugs".

21 ~~(26)~~ (28) "Includes" and "including" when used in a definition
22 contained in this article is not considered to exclude other things
23 otherwise within the meaning of the term being defined.

24 ~~(27)~~ (29) "Layaway sale" means a transaction in which property
25 is set aside for future delivery to a customer who makes a deposit,

1 agrees to pay the balance of the purchase price over a period of
2 time and, at the end of the payment period, receives the property.
3 An order is accepted for layaway by the seller when the seller
4 removes the property from normal inventory or clearly identifies
5 the property as sold to the purchaser.

6 ~~(28)~~ (30) "Lease" includes rental, hire and license. "Lease"
7 means any transfer of possession or control of tangible personal
8 property for a fixed or indeterminate term for consideration. A
9 lease or rental may include future options to purchase or extend.

10 (A) "Lease" does not include:

11 (i) A transfer of possession or control of property under a
12 security agreement or deferred payment plan that requires the
13 transfer of title upon completion of the required payments;

14 (ii) A transfer or possession or control of property under an
15 agreement that requires the transfer of title upon completion of
16 required payments and payment of an option price does not exceed
17 the greater of \$100 or one percent of the total required payments;
18 or

19 (iii) Providing tangible personal property along with an
20 operator for a fixed or indeterminate period of time. A condition
21 of this exclusion is that the operator is necessary for the
22 equipment to perform as designed. For the purpose of this
23 subparagraph, an operator must do more than maintain, inspect or
24 set-up the tangible personal property.

25 (iv) "Lease" or "rental" includes agreements covering motor

1 vehicles and trailers where the amount of consideration may be
2 increased or decreased by reference to the amount realized upon
3 sale or disposition of the property as defined in 26 U.S.C.
4 §7701(h) (1).

5 (B) This definition shall be used for sales and use tax
6 purposes regardless if a transaction is characterized as a lease or
7 rental under generally accepted accounting principles, the Internal
8 Revenue Code, the Uniform Commercial Code or other provisions of
9 federal, state or local law.

10 ~~(29)~~ (31) "Load and leave" means delivery to the purchaser by
11 use of a tangible storage media where the tangible storage media is
12 not physically transferred to the purchaser.

13 ~~(30)~~ (32) "Mobility-enhancing equipment" means equipment,
14 including repair and replacement parts to the equipment, but does
15 not include "durable medical equipment", which:

16 (A) Is primarily and customarily used to provide or increase
17 the ability to move from one place to another and which is
18 appropriate for use either in a home or a motor vehicle;

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

20 (C) Does not include any motor vehicle or equipment on a motor
21 vehicle normally provided by a motor vehicle manufacturer.

22 ~~(31)~~ (33) "Model I seller" means a seller registered under the
23 Streamlined Sales and Use Tax Agreement that has selected a
24 certified service provider as its agent to perform all the seller's
25 sales and use tax functions, other than the seller's obligation to

1 remit tax on its own purchases.

2 ~~(32)~~ (34) "Model II seller" means a seller registered under
3 the Streamlined Sales and Use Tax Agreement that has selected a
4 certified automated system to perform part of its sales and use tax
5 functions, but retains responsibility for remitting the tax.

6 ~~(33)~~ (35) "Model III seller" means a seller registered under
7 the agreement that has sales in at least five member states, has
8 total annual sales revenue of at least \$500 million, has a
9 proprietary system that calculates the amount of tax due each
10 jurisdiction and has entered into a performance agreement with the
11 member states that establishes a tax performance standard for the
12 seller. As used in this definition, a seller includes an affiliated
13 group of sellers using the same proprietary system.

14 ~~(34)~~ (36) "Over-the-counter drug" means a drug that contains
15 a label that identifies the product as a drug as required by 21 CFR
16 § 201.66. The "over-the-counter drug" label includes:

17 (A) A "drug facts" panel; or

18 (B) A statement of the "active ingredient(s)" with a list of
19 those ingredients contained in the compound, substance or
20 preparation.

21 ~~(35)~~ (37) "Person" means an individual, trust, estate,
22 fiduciary, partnership, limited liability company, limited
23 liability partnership, corporation or any other legal entity.

24 ~~(36)~~ (38) "Personal service" includes those:

25 (A) Compensated by the payment of wages in the ordinary course

1 of employment; and

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

5 ~~(37)~~ (39) (A) "Prepared food" means:

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

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

9 (iii) Food sold with eating utensils provided by the seller,
10 including plates, knives, forks, spoons, glasses, cups, napkins or
11 straws. A plate does not include a container or packaging used to
12 transport the food.

13 (B) "Prepared food" in subparagraph (ii), paragraph (A) of
14 this subdivision does not include food that is only cut, repackaged
15 or pasteurized by the seller, and eggs, fish, meat, poultry and
16 foods containing these raw animal foods requiring cooking by the
17 consumer as recommended by the Food and Drug Administration in
18 Chapter 3, Part 401.11 of its Food Code of 2001 so as to prevent
19 food-borne illnesses.

20 (C) Additionally, "prepared food" as defined in this
21 subdivision does not include:

22 (i) Food sold by a seller whose proper primary NAICS
23 classification is manufacturing in Sector 311, except Subsection
24 3118 (bakeries);

25 (ii) Food sold in an unheated state by weight or volume as a

1 single item; or

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

5 ~~(38)~~ (40) "Prescription" means an order, formula or recipe
6 issued in any form of oral, written, electronic or other means of
7 transmission by a duly licensed practitioner authorized by the laws
8 of this state to issue prescriptions.

9 ~~(39)~~ (41) "Prewritten computer software" means "computer
10 software", including prewritten upgrades, which is not designed and
11 developed by the author or other creator to the specifications of
12 a specific purchaser.

13 (A) The combining of two or more prewritten computer software
14 programs or prewritten portions thereof does not cause the
15 combination to be other than prewritten computer software.

16 (B) "Prewritten computer software" includes software designed
17 and developed by the author or other creator to the specifications
18 of a specific purchaser when it is sold to a person other than the
19 specific purchaser. Where a person modifies or enhances computer
20 software of which the person is not the author or creator, the
21 person is considered to be the author or creator only of the
22 person's modifications or enhancements.

23 (C) "Prewritten computer software" or a prewritten portion
24 thereof that is modified or enhanced to any degree, where the
25 modification or enhancement is designed and developed to the

1 specifications of a specific purchaser, remains prewritten computer
2 software. However, where there is a reasonable, separately stated
3 charge or an invoice or other statement of the price given to the
4 purchaser for the modification or enhancement, the modification or
5 enhancement does not constitute prewritten computer software.

6 ~~(40)~~ (42) "Product-based exemption" means an exemption based
7 on the description of the product or service and not based on who
8 purchases the product or service or how the purchaser intends to
9 use the product or service.

10 ~~(41)~~ (43) "Prosthetic device" means a replacement, corrective
11 or supportive device, including repair and replacement parts for
12 the device worn on or in the body, to:

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

14 (B) Prevent or correct physical deformity or malfunction of
15 the body; or

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

17 ~~(42)~~ (44) "Protective equipment" means items for human wear
18 and designed as protection of the wearer against injury or disease
19 or as protections against damage or injury of other persons or
20 property but not suitable for general use.

21 ~~(43)~~ (45) "Purchase price" means the measure subject to the
22 tax imposed by article fifteen or fifteen-a of this chapter and has
23 the same meaning as sales price.

24 ~~(44)~~ (46) "Purchaser" means a person to whom a sale of
25 personal property is made or to whom a service is furnished.

1 ~~(45)~~ (47) "Retail sale" or "sale at retail" means:

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

4 (B) Any sale of a service other than a service purchased for
5 resale.

6 ~~(46)~~ (48) (A) "Sales price" means the measure subject to the
7 tax levied under article fifteen or fifteen-a of this chapter and
8 includes the total amount of consideration, including cash, credit,
9 property and services, for which personal property or services are
10 sold, leased or rented, valued in money, whether received in money
11 or otherwise, without any deduction for the following:

12 (i) The seller's cost of the property sold;

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

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

18 (iv) Delivery charges; and

19 (v) Installation charges.

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

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

24 (ii) Interest, financing and carrying charges from credit
25 extended on the sale of personal property, goods or services, if

1 the amount is separately stated on the invoice, bill of sale or
2 similar document given to the purchaser; or

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

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

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

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

13 (iii) The amount of the consideration attributable to the sale
14 is fixed and determinable by the seller at the time of the sale of
15 the item to the purchaser; and

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

17 (I) The purchaser presents a coupon, certificate or other
18 documentation to the seller to claim a price reduction or discount
19 where the coupon, certificate or documentation is authorized,
20 distributed or granted by a third party with the understanding that
21 the third party will reimburse any seller to whom the coupon,
22 certificate or documentation is presented;

23 (II) The purchaser identifies himself or herself to the seller
24 as a member of a group or organization entitled to a price
25 reduction or discount (a "preferred customer" card that is

1 available to any patron does not constitute membership in such a
2 group); or

3 (III) The price reduction or discount is identified as a
4 third-party price reduction or discount on the invoice received by
5 the purchaser or on a coupon, certificate or other documentation
6 presented by the purchaser.

7 ~~(47)~~ (49) "Sales tax" means the tax levied under article
8 fifteen of this chapter.

9 ~~(48)~~ (50) "School art supply" means an item commonly used by
10 a student in a course of study for artwork. The term is mutually
11 exclusive of the terms "school supply", "school instructional
12 material" and "school computer supply" and may be taxed
13 differently. The following is an all-inclusive list:

- 14 (A) Clay and glazes;
- 15 (B) Paints; acrylic, tempora and oil;
- 16 (C) Paintbrushes for artwork;
- 17 (D) Sketch and drawing pads; and
- 18 (E) Watercolors.

19 ~~(49)~~ (51) "School instructional material" means written
20 material commonly used by a student in a course of study as a
21 reference and to learn the subject being taught. The term is
22 mutually exclusive of the terms "school supply", "school art
23 supply" and "school computer supply" and may be taxed differently.
24 The following is an all-inclusive list:

- 25 (A) Reference books;

1 (B) Reference maps and globes;

2 (C) Textbooks; and

3 (D) Workbooks.

4 ~~(50)~~ (52) "School computer supply" means an item commonly used
5 by a student in a course of study in which a computer is used. The
6 term is mutually exclusive of the terms "school supply", "school
7 art supply" and "school instructional material" and may be taxed
8 differently. The following is an all-inclusive list:

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

10 (B) Handheld electronic schedulers, except devices that are
11 cellular phones;

12 (C) Personal digital assistants, except devices that are
13 cellular phones;

14 (D) Computer printers; and

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

16 ~~(51)~~ (53) "School supply" means an item commonly used by a
17 student in a course of study. The term is mutually exclusive of the
18 terms "school art supply", "school instructional material" and
19 "school computer supply" and may be taxed differently. The
20 following is an all-inclusive list of school supplies:

21 (A) Binders;

22 (B) Book bags;

23 (C) Calculators;

24 (D) Cellophane tape;

- 1 (E) Blackboard chalk;
- 2 (F) Compasses;
- 3 (G) Composition books;
- 4 (H) Crayons;
- 5 (I) Erasers;
- 6 (J) Folders; expandable, pocket, plastic and manila;
- 7 (K) Glue, paste and paste sticks;
- 8 (L) Highlighters;
- 9 (M) Index cards;
- 10 (N) Index card boxes;
- 11 (O) Legal pads;
- 12 (P) Lunch boxes;
- 13 (Q) Markers;
- 14 (R) Notebooks;
- 15 (S) Paper; loose-leaf ruled notebook paper, copy paper, graph
- 16 paper, tracing paper, manila paper, colored paper, poster board and
- 17 construction paper;
- 18 (T) Pencil boxes and other school supply boxes;
- 19 (U) Pencil sharpeners;
- 20 (V) Pencils;
- 21 (W) Pens;
- 22 (X) Protractors;
- 23 (Y) Rulers;
- 24 (Z) Scissors; and
- 25 (AA) Writing tablets.

1 ~~(52)~~ (54) "Seller" means any person making sales, leases or
2 rentals of personal property or services.

3 ~~(53)~~ (55) "Service" or "selected service" includes all
4 nonprofessional activities engaged in for other persons for a
5 consideration which involve the rendering of a service as
6 distinguished from the sale of tangible personal property, but does
7 not include contracting, personal services, services rendered by an
8 employee to his or her employer, any service rendered for resale or
9 any service furnished by a business that is subject to the control
10 of the Public Service Commission when the service or the manner in
11 which it is delivered is subject to regulation by the Public
12 Service Commission of this state. The term "service" or "selected
13 service" does not include payments received by a vendor of tangible
14 personal property as an incentive to sell a greater volume of such
15 tangible personal property under a manufacturer's, distributor's or
16 other third-party's marketing support program, sales incentive
17 program, cooperative advertising agreement or similar type of
18 program or agreement and these payments are not considered to be
19 payments for a "service" or "selected service" rendered, even
20 though the vendor may engage in attendant or ancillary activities
21 associated with the sales of tangible personal property as required
22 under the programs or agreements.

23 ~~(54)~~ (56) "Soft drink" means nonalcoholic beverages that
24 contain natural or artificial sweeteners. "Soft drinks" do not
25 include beverages that contain milk or milk products, soy, rice or

1 similar milk substitutes or greater than fifty percent of vegetable
2 or fruit juice by volume.

3 ~~(55)~~ (57) "Sport or recreational equipment" means items
4 designed for human use and worn in conjunction with an athletic or
5 recreational activity that are not suitable for general use. "Sport
6 or recreational equipment" are mutually exclusive of and may be
7 taxed differently than apparel within the definition of "clothing",
8 "clothing accessories or equipment" and "protective equipment". The
9 following list contains examples and is not intended to be an all-
10 inclusive list. "Sport or recreational equipment" shall include:

11 (A) Ballet and tap shoes;

12 (B) Cleated or spiked athletic shoes;

13 (C) Gloves, including, but not limited to, baseball, bowling,
14 boxing, hockey and golf;

15 (D) Goggles;

16 (E) Hand and elbow guards;

17 (F) Life preservers and vests;

18 (G) Mouth guards;

19 (H) Roller and ice skates;

20 (I) Shin guards;

21 (J) Shoulder pads;

22 (K) Ski boots;

23 (L) Waders; and

24 (M) Wetsuits and fins.

25 ~~(56)~~ (58) "State" means any state of the United States, the

1 District of Columbia and the Commonwealth of Puerto Rico.

2 ~~(57)~~ (59) "Tangible personal property" means personal property
3 that can be seen, weighed, measured, felt or touched or that is in
4 any manner perceptible to the senses. "Tangible personal property"
5 includes, but is not limited to, electricity, steam, water, gas and
6 prewritten computer software.

7 ~~(58)~~ (60) "Tax" includes all taxes levied under articles
8 fifteen and fifteen-a of this chapter and additions to tax,
9 interest and penalties levied under article ten of this chapter.

10 ~~(59)~~ (61) "Tax Commissioner" means the State Tax Commissioner
11 or his or her delegate. The term "delegate" in the phrase "or his
12 or her delegate", when used in reference to the Tax Commissioner,
13 means any officer or employee of the State Tax Division duly
14 authorized by the Tax Commissioner directly, or indirectly by one
15 or more redelegations of authority, to perform the functions
16 mentioned or described in this article or rules promulgated for
17 this article.

18 ~~(60)~~ (62) "Taxpayer" means any person liable for the taxes
19 levied by articles fifteen and fifteen-a of this chapter or any
20 additions to tax penalties imposed by article ten of this chapter.

21 ~~(61)~~ (63) "Telecommunications service" or "telecommunication
22 service" when used in this article and articles fifteen and
23 fifteen-a of this chapter shall have the same meaning as that term
24 is defined in section two-b of this article.

25 ~~(62)~~ (64) "Tobacco" means cigarettes, cigars, chewing or pipe

1 tobacco or any other item that contains tobacco.

2 ~~(63)~~ (65) "Use tax" means the tax levied under article
3 fifteen-a of this chapter.

4 ~~(64)~~ (66) "Use-based exemption" means an exemption based on a
5 specified use of the product or service by the purchaser.

6 ~~(65)~~ (67) "Vendor" means any person furnishing services taxed
7 by article fifteen or fifteen-a of this chapter or making sales of
8 tangible personal property or custom software. "Vendor" and
9 "seller" are used interchangeably in this article and in articles
10 fifteen and fifteen-a of this chapter.

11 (c) Additional definitions.

12 Other terms used in this article are defined in articles
13 fifteen and fifteen-a of this chapter, which definitions are
14 incorporated by reference into this article. Additionally, other
15 sections of this article may define terms primarily used in the
16 section in which the term is defined.

17 **§11-15B-2a. Streamlined Sales and Use Tax Agreement defined.**

18 As used in this article and articles fifteen and fifteen-a of
19 this chapter, the term "Streamlined Sales and Use Tax Agreement" or
20 "agreement" means the agreement adopted November 12, 2002, by
21 states that enacted authority to engage in multistate discussions
22 similar to that provided in section four of this article, except
23 when the context in which the term is used clearly indicates that
24 a different meaning is intended by the Legislature. "Agreement"
25 includes amendments to the agreement adopted by the implementing

1 states in calendar years 2003, 2004, 2005, 2006, 2007, 2008, 2009,
2 2010 and amendments adopted by the governing board on or before,
3 January 31, ~~2010~~ 2011, but does not include any substantive changes
4 in the agreement adopted after January 31, ~~2010~~ 2011.

5 **§11-15B-24. Administration of exemptions.**

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

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

11 (2) A purchaser is not required to provide a signature to
12 claim an exemption from tax unless a paper exemption certificate is
13 used.

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

16 (4) The seller shall obtain the same information for proof of
17 a claimed exemption regardless of the medium in which the
18 transaction occurred.

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

23 (6) The seller shall maintain proper records of exempt
24 transactions and provide the records to the Tax Commissioner or the
25 Tax Commissioner's designee.

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

5 (8) ~~After December 31, 2007, in~~ In the case of drop shipments,
6 a third-party vendor such as a drop shipper may claim a resale
7 exemption based on an exemption certificate provided by its
8 customer/reseller or any other acceptable information available to
9 the third-party vendor evidencing qualification for a resale
10 exemption, regardless of whether the customer/reseller is
11 registered to collect and remit sales and use taxes in this state,
12 when the sale is sourced to this state.

13 (b) The Tax Commissioner shall relieve sellers that follow the
14 requirements of this section from the tax otherwise applicable if
15 it is determined that the purchaser improperly claimed an exemption
16 and shall hold the purchaser liable for the nonpayment of tax. This
17 relief from liability does not apply:

18 (A) To a seller who fraudulently fails to collect the tax;

19 (B) To a seller who solicits purchasers to participate in the
20 unlawful claim of an exemption;

21 (C) To a seller who accepts an exemption certificate when the
22 purchaser claims an entity-based exemption when: (i) The subject
23 of the transaction sought to be covered by the exemption
24 certificate is actually received by the purchaser at a location
25 operated by the seller; and (ii) the state in which that location

1 resides provides an exemption certificate that clearly and
2 affirmatively indicates (graying out exemption reason types on
3 uniform form and posting it on a state's website is an indicator)
4 that the claimed exemption is not available in that state.

5 (c) *Time within which seller must obtain exemption*
6 *certificates.* - A seller is relieved from paying tax otherwise
7 applicable under article fifteen or fifteen-a of this chapter if
8 the seller obtains a fully completed exemption certificate or
9 captures the required data elements within ninety days subsequent
10 to the date of sale.

11 (d) (1) If the seller has not obtained an exemption certificate
12 or all required data elements, the seller ~~may~~ shall, within one
13 hundred twenty days subsequent to a request for substantiation by
14 the Tax Commissioner, either prove that the transaction was not
15 subject to tax by other means or obtain a fully completed exemption
16 certificate from the purchaser, taken in good faith. For purposes
17 of this section, the Tax Commissioner may continue to apply this
18 state's standards of good faith until a uniform standard for good
19 faith is defined in the Streamlined Sales and Use Tax Agreement.

20 (2) If the seller obtains the information described in
21 subdivision (1) of this subsection, the seller shall be relieved of
22 any liability for the tax on the transaction unless it is
23 discovered through the audit process that the seller had knowledge
24 or had reason to know at the time such information was provided
25 that the information relating to the exemption claimed was

1 materially false or the seller otherwise knowingly participated in
2 activity intended to purposefully evade the tax that is properly
3 due on the transaction.

4 ~~(2)~~ (e) Nothing in this section shall affect the ability of
5 the Tax Commissioner to require purchasers to update exemption
6 certificate information or to reapply with the state to claim
7 certain exemptions.

8 ~~(3)~~ (f) ~~Notwithstanding the preceding provisions of this~~
9 ~~section, when an exemption may be claimed by exemption certificate,~~
10 ~~a~~ A seller is relieved from paying the tax otherwise applicable if
11 the seller obtains a blanket exemption certificate from a purchaser
12 with which the seller has a recurring business relationship. ~~The~~
13 Notwithstanding the provisions of subsection (e) of this section,
14 the Tax Commissioner may not request from the seller renewal of
15 blanket certificates or updates of exemption certificate
16 information or data elements when there is a recurring business
17 relationship between the buyer and seller. For purposes of this
18 subdivision, a recurring business relationship exists when a period
19 of no more than twelve months elapses between sales transactions.

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

23 **§11-15B-32. Effective date.**

24 (a) The provisions of this article, as amended or added during
25 the regular legislative session in the year 2003, shall take effect

1 January 1, 2004, and apply to all sales made on or after that date
2 and to all returns and payments due on or after that day, except as
3 otherwise expressly provided in section five of this article.

4 (b) The provisions of this article, as amended or added during
5 the second extraordinary legislative session in the year 2003,
6 shall take effect January 1, 2004, and apply to all sales made on
7 or after that date.

8 (c) The provisions of this article, as amended or added by act
9 of the Legislature in the year 2004 shall apply to all sales made
10 on or after the date of passage in the year 2004.

11 (d) The provisions of this article, as amended or added during
12 the regular legislative session in the year 2008, shall apply to
13 all sales made on or after the date of passage and to all returns
14 and payments due on or after that day, except as otherwise
15 expressly provided in this article.

16 (e) The provisions of this article, as amended or added during
17 the 2009 regular legislative session, shall apply to all sales made
18 on or after the date of passage and to all returns and payments due
19 on or after that day, except as otherwise expressly provided in
20 this article.

21 (f) The provisions of this article, as amended or added during
22 the 2010 regular legislative session, shall apply to all sales made
23 on or after the date of passage and to all returns and payments due
24 on or after that day, except as otherwise expressly provided in
25 this article.

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

(NOTE: The 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.