WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: State Tax Commission TITLE NUMBER: 110

CITE AUTHORITY W. Va. Code §§ 11-13M-7, 8 and 9

AMENDMENT TO AN EXISTING RULE: YES ______ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ______

TITLE OF RULE BEING AMENDED: ______

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 13M

TITLE OF RULE BEING PROPOSED: Tax Credit For New Value-Added Wood Manufacturing Operations

THE ABOVE PROPOSED LEGISLATIVE RULE, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

Robin C. Capehart, Cabinet Secretary

$3.80

TITLE 110
MODIFIED
WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF TAX AND REVENUE
STATE TAX COMMISSION

SERIES 13M
TAX CREDIT FOR NEW VALUE-ADDED WOOD MANUFACTURING OPERATIONS

§ 110-13M-1. General.

1.1 **Scope.** -- This legislative rule supplements W. Va. Code § 11-13M-1 et seq., which requires the Tax Commissioner to prescribe a method for apportionment of the credit available between a predecessor and a successor taxpayer with different taxable years upon occurrence of a merger and authorizes the Tax Commissioner to prescribe any other rules necessary to claim the credit.

1.2 **Authority.** -- W. Va. Code §§ 11-13M-7, 8 and 10.

1.3 **Filing Date.** --

1.4 **Effective Date.** --

§ 110-13M-2. Definitions.

The following terms defined in W. Va. Code § 11-13M-2 are explained, illustrated or clarified by the subsections immediately below them:

2.1 "**Affiliate**" means and includes all persons, as defined in this section, which are affiliates of each other, when either directly or indirectly:

(A) One person controls or has the power to control the other, or

(B) A third party or third parties control or have the power to control two persons, the two thus being affiliates. In determining whether concerns are independently owned and operated and whether or not an affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management and contractual relationships.

2.1.1 The term "affiliate" includes a member of an affiliated group.

2.2 "**Consumer-ready wood products**" means value-added wood products that are ready for sale to consumers at the end of the manufacturing process. Consumer-ready wood includes any value-added wood product that does not require further manufacturing before it may ordinarily be used or consumed by the purchaser of the product, except that consumer-ready wood product does not include any product that is not manufactured primarily from wood, any product that is not commercially marketed as a wood product for sale primarily to consumers of the product, or paper or paper products.

2.2.1 Consumer-ready wood products are considered to be manufactured if they are produced by employees in a factory on an assembly line basis, as opposed to craftsmen or artisans who only make customized and/or unique wood products. The manufacturing process does not begin until after wood arrives at the factory for conversion into a wood product ready to be used or consumed by a purchaser of the product.

2.2.2 Consumer-ready wood products are considered to be manufactured primarily from wood if more than half of the final product consists of wood and if the cost of the wood constitutes more than half of the cost of all materials included in the final product.

2.2.3 Consumer-ready wood products are considered ready for sale to consumers even though the products are sold to wholesalers or retailers for resale, and even though the ultimate consumer may be required to assemble them or would normally be expected to put finishing touches on them after purchase.

2.2.4 For example, consumer-ready wood products include, but are not limited to, gates, split rails and posts used for fencing. Even if the consumer assembles, installs and paints these products, no further manufacturing occurs. Similarly, manufacture of lumber would be considered a consumer-ready wood product unless sold to a manufacturer for further manufacturing.

2.3 "**Corporation**" includes any corporation, a joint-stock company and any association or other organization which is classified as a corporation under federal income tax law.

2.3.1 The term "corporation" includes a limited liability company if it is taxable as a corporation under federal income tax law.

2.4 "**Full-time employee**" means a permanent hourly employee of an eligible taxpayer, who is a West Virginia domiciled resident, and works in a new consumer-ready wood product manufacturing facility in this State, or in a new consumer-ready wood product line of an existing manufacturing facility in this State, more than eighteen hundred hours during the entire twelve-month period ending on the last day of the taxable year of the eligible employer, whether these hours are hours worked at the manufacturing facility, or include hours of employer paid vacation leave or other employer paid leave. Full-time employee does not include an employee who is a part-time, seasonal or temporary employee.

2.4.1 No combination of part-time, seasonal or temporary employees may be considered equivalent to a full-time employee.

2.4.2 No person who is not an employee (such as an independent contractor) may be considered a full-time employee.

2.4.3 An employee who moves to West Virginia in order to become a West Virginia domiciled resident in order to fill a new job may be counted as a full-time employee if he or she otherwise qualifies as a full-time employee.

2.5 "**New job**" means a job at a new consumer-ready wood product manufacturing facility located in this state, or at a new consumer-ready wood product line at an existing manufacturing facility located in this state, which did not exist in this state with any employer as of the first day of the second calendar month preceding the calendar month in which the new consumer-ready wood product manufacturing facility begins to manufacture consumer-ready wood products, or in which the new consumer-ready wood product line begins to manufacture consumer-ready wood products in an existing manufacturing facility located in this state, that is filled by a full-time employee of the eligible taxpayer.

2.5.1 If both consumer-ready and non-consumer-ready wood products are manufactured by a taxpayer, the number of new jobs to be used for calculating the credit shall be limited to the new jobs attributable to the consumer-ready wood products.

2.5.2 If a type of wood product is sold ready for use by consumers, and is also sold to manufacturers for use in the manufacture of consumer-ready wood products, the wood product is a consumer-ready wood product only if commercially marketed as a wood product for sale *primarily* to consumers. If the wood product is primarily marketed to consumers, all of the jobs created at the manufacturing facility shall be considered new jobs for purposes of computing the credit. Otherwise, the number of new jobs to be used for calculating the credit shall be limited to the new jobs attributable to the sales to consumers, including sales to wholesalers and retailers for resale to consumers.

2.5.2.1 For example, if a new manufacturing facility manufactures 2x4 lumber which it sells in equal dollar amounts to consumers and to manufacturers, only half of the jobs created at the facility would be counted as new jobs when computing the credit.

2.6 "**Partnership**" means and includes a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, which is classified as a partnership for federal income tax purposes for the taxable year.

2.6.1 The term "partnership" may include a limited liability company if it is not taxable as a corporation under federal income tax law.

2.7 "**Tax year or taxable year**" means the tax year of the taxpayer for federal income tax purposes.

2.7.1 The term "tax year" includes a short tax year by an eligible taxpayer during its first year of operation.

§ 110-13M-3. Overview of the credit.

3.1 The purpose of the credit is to encourage capital investment in the manufacturing of consumer-ready wood products in this State.

3.2 The credit is available to eligible taxpayers to claim against that portion of their Business Franchise Tax and Personal Income Tax or Corporation Net Income Tax for tax years beginning on or after July 1, 1997, which is directly attributable to a new consumer-ready wood product facility located in this State and to a new consumer-ready wood product production line at an existing manufacturing facility located in this State, which first begins operation after June 30, 1997.

3.3 The credit is scheduled to expire July 1, 2002.

3.4 The total amount of credit allowable is two hundred fifty dollars ($250) for each new full-time job created in a new consumer-ready wood product manufacturing facility or in a new consumer-ready wood product line of an existing manufacturing facility.

3.4.1 The full $250 per new job is available only when the new job exists for the entire taxable year. Otherwise, the amount of credit allowed is prorated as provided by W. Va. Code § 11-13M-4.

§ 110-13M-4. Application of the credit.

4.1 This credit may be applied only after all other allowable credits are applied.

4.2 This credit must be applied against an eligible taxpayer's Business Franchise Tax liability before any remaining credit may be applied against that taxpayer's Personal Income Tax or Corporation Net Income Tax liability.

4.2.1 In no event may any remaining credit be applied against both Personal Income Tax liability and Corporation Net Income Tax liability.

4.2.2 In no event may the credit applied exceed the eligible taxpayer's liability for Business Franchise Tax and Personal Income Tax or Corporation Net Income Tax for the tax year.

4.3 Any amount of credit allowed which remains after being applied against eligible taxes for the tax year in which the new full-time jobs were created is forfeited and may not be used in any other tax year.

4.4 If a taxpayer does not claim the credit in the tax year when it is allowed, it is forfeited and may not be used in any other tax year. However, the unclaimed credit is not forfeited if it is subsequently claimed for that year on a timely filed amended return.

4.5 The credit may be claimed only by one taxpayer for a given period of time, and may not be assigned to any other taxpayer. However, a husband and wife filing a joint personal income tax return may both claim the credit if either or both of them is an eligible taxpayer, to the extent provided for in Subsection 3.2 of this rule.

4.5.1 If an eligible taxpayer is a member of an affiliated group that files its Business Franchise Tax return on a consolidated basis, the affiliated group may claim the credit to the extent provided for in Subsection 3.2 of this rule. However, each affiliate must file a pro forma federal income tax return and an information return for each tax against which this tax credit is claimed, unless the Tax Commissioner requires filing on a separate basis based on a finding that a deconsolidated filing would be more appropriate for ascertaining an accurate and realistic determination of the new jobs created.

§ 110-13M-5. Annual computation of new jobs held by full-time employees.

5.1 Because all eligible taxpayers are to be treated equally and uniformly, the Tax Commissioner finds that all eligible taxpayers in the same business of manufacturing value-added products shall use the same method prescribed by W. Va. Code § 11-13M-7 for determining the number of jobs held by full-time employees in the taxable year. However, the number of new jobs filled during the taxable year by full-time employees of the eligible taxpayer shall be reflective of actual new jobs in this State, that is, that number may not exceed the net increase in this State of full-time jobs held by all employees in all types of business activities of the taxpayer.

5.2 Individuals holding new jobs may be replaced by other individuals, the job title applicable to those new jobs may be changed, and even the job functions may change without adversely affecting the determination of new jobs, as long as adequate documentation is maintained by the eligible taxpayer so that the validity of changes are traceable and verifiable.

§ 110-13M-6. Availability of credit between eligible predecessor and successor taxpayers.

6.1 When an eligible taxpayer merges with another entity and the resulting entity becomes an eligible taxpayer, but the taxable year of the predecessor eligible taxpayer and the taxable year of the successor eligible taxpayer are different, the amount of credit available to the predecessor shall be the amount available if the tax years were not different. However, the amount of credit apportioned to the successor shall be limited to that portion of the predecessor's credit which remains, multiplied by a fraction the numerator of which is the number of days during the same tax year of the successor which coincide with the calendar days remaining in the tax year of the predecessor if it had not merged, and the denominator of which is the number of days remaining in the same tax year of the predecessor if it had not merged. If any of the predecessor's credit which remains cannot be used by the successor in the same tax year, it is forfeited and may not be carried over or carried back to any other tax year.

6.2 No recapture or loss of credit shall occur merely as a result of a change in the form of conducting the business as long as the successor entity is also an eligible taxpayer, and the successor is entitled to all of the credit for the tax year in which the change occurred.

6.2.1 A change in the form of conducting business is a change in the type of business entity, such as a change from a C corporation to an S corporation or a limited liability company, or from a sole proprietorship to a C or S corporation, limited liability company or partnership.

§ 110-13M-7. Credit recapture for improperly claiming the credit or for excessive jobs loss.

7.1 If an eligible taxpayer permanently or indefinitely ceases operation of its new consumer-ready wood product line or manufacturing facility, the credit is subject to recapture because the number of individuals employed in full-time jobs by the employer will have decreased by more than ten percent (10%). W. Va. Code § 11-13M-9.

7.2 When the eligible taxpayer is a partnership, limited liability company or S corporation, the recapture tax shall be paid by the partners, members or shareholders in the same proportion that they claimed the credit during the tax year in which recapture occurs, but any recapture tax liability not satisfied by one or more partners, members or shareholders becomes the joint and several liability of them all.

7.3 Penalties and additions to tax caused by a decrease of more than ten percent (10%) in the number of individuals employed in full-time positions may be waived by the Tax Commissioner, in whole or in part, at the discretion of the Tax Commissioner, only when the taxpayer demonstrates that the decrease is due to reasonable cause.

7.3.1 Reasonable cause includes loss of new jobs as a result of fire, flood, storm or other casualty; theft or embezzlement; an economic recession or depression which adversely decreases the demand for new consumer-ready wood products; or any other cause approved by the Tax Commissioner.

7.4 Reasonable cause does not include loss of new jobs as a result of transferring jobs to another kind of manufacturing facility or another product line or to another location outside this State.

§ 110-13M-8. General Procedure and Administration.

8.1 To claim this credit, a taxpayer shall comply with the provisions of W. Va. Code § 11-13M-1 et seq. and this rule, and shall timely provide complete and accurate forms, schedules and other information required by the Tax Commissioner.

8.1.1 The taxpayer shall file required forms, schedules and information requested by the Tax Commissioner by the due date of the return for the taxes against which the credit is to be applied, with regard to any extension of time for filing but without regard to any extension of time for payment.

8.2 When applying for this credit, a taxpayer is also subject to the provisions of W. Va. Code § 11-21-1 et seq. (Personal Income Tax), W. Va. Code § 11-23-1 et seq. (Business Franchise Tax) and W. Va. Code § 11-24-1 et seq. (Corporation Net Income Tax) and rules issued pursuant to those statutes, as well as to the provisions of W. Va. Code § 11-10-1 et seq. (Procedure and Administration) which provide for administration of those taxes.

8.3 A taxpayer which does not maintain the records required to verify the validity of its eligibility for the credit and the accuracy of the amount of credit claimed may be denied credit or be subject to recapture to the extent the eligibility and accuracy are not substantiated by its records.

8.4 A taxpayer filing on a short tax year basis for its first tax year shall calculate its new jobs filled during the tax year by full-time employees by calculating the average number of new jobs held by full-time employees for each month of the short tax year by averaging the beginning and ending monthly employment of full-time employees holding new jobs, then totaling the monthly averages and dividing that total by the number of months in the short tax year.

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

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November 12, 1998

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NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: Keith Larson
State Tax Commission
Capitol Complex
Building 1, Room 400-W

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Tax Credits for New Value-Added Wood Manufacturing Facilities, 110CSR13M**

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative Rule
   (a) as originally filed ____
   (b) as modified by the agency ✓

2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached. ____

3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached. ____

4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached. ____

DAG

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: State Tax Commission

Subject: Tax Credits for New Value-Added Wood Manufacturing Facilities, 110CSR13M

PERTINENT DATES

Filed for public comment: June 2, 1998
Public comment period ended: July 2, 1998
Filed following public comment period: July 21, 1998
Filed LRMRC: July 21, 1998
Filed as emergency:

Fiscal Impact: None

ABSTRACT

The proposed rule is new. The following is a section by section synopsis of the proposed rule.

Section 1 is the standard general section, setting forth the scope, authority, filing date and effective date of the proposed rule.

Section 2 defines terms.

Section 3 provides an overview of the credit. The credit may be taken against that portion of an eligible taxpayers Business Franchise Tax, Personal Income Tax or Corporation Net Tax for tax years beginning after July 1, 1997, which is attributable to a new consumer-ready wood product facility located in this state or a new consumer-ready wood product production line located in this state which first begins operation after June 30, 1997. The credit of $250 for each new full-time job created expires July 1, 2002.

Section 4 sets forth the application of the credit. It provides that any remaining tax credit may not be carried over and is forfeited if not claimed in the year in which it is allowed.

Section 5 provides that the number of new jobs shall be determined in the same manner that it is for other taxpayers in the business of manufacturing value-added products.

Section 6 sets forth the method of determining the apportionment of the credit where two entities merge and the predecessor and successor taxpayer have different tax years. It provides that where an eligible taxpayer permanently or indefinitely ceases operation, the credit is subject to recapture.

Section 7 permits the Commissioner to waive penalties or additions to tax caused by a decrease of more than 10% in the number of full-time positions when the taxpayer demonstrates that the decrease is due to reasonable cause.

Section 8 sets forth the procedure for claiming the credit. It also specifies the method of calculating full-time jobs to be used by a taxpayer filing on a short tax year basis.

AUTHORITY

Statutory authority: W.Va. Code, §11-13M-7, 8, & 10, which provide, in part, as follows:

§11-13M-10.

The tax commission may prescribe such rules as may be necessary to carry out the purposes of this article, including, but not limited to, rules relating to applicability of credit, method of claiming of credit, credit recapture, documentation necessary to claim credit and rules preventing abuse of this article by related persons or by change in the form of doing business. All rules promulgated under this article shall be promulgated in accordance with article three, chapter twenty-nine-a of this code.

§11-13M-7.

...(d) The tax commissioner may prescribe by rule alternative methods for determining the number of jobs held by full-time permanent employees in the taxable year upon a finding by the tax commissioner that an alternative method is appropriate for ascertaining an accurate and realistic determination of new jobs held by full-time employees in the taxable year. For purposes of prescribing alternative methods, the tax commissioner may require the deduction or inclusion of jobs in place with contract service providers that provide or at any time provided any service to any eligible taxpayer or to any member of the affiliated group related to any eligible taxpayer or to any one or more entities related to the eligible taxpayer: *Provided,* That deduction, or inclusion of those jobs shall only pertain to jobs held by employees of the contract service provider that are attributable or that were formerly attributable to the service provided by the contract service provider to the taxpayer. The tax commissioner may require any deconsolidation of any filing entity, or may require an alternative method based on separate accounting, unitary combination, combination of the affiliated group or combination of the taxpayer and one or more entities related to the taxpayer, or any other method determined by the tax commissioner to be appropriate for ascertaining an accurate and realistic determination of new jobs held by full-time employees in the taxable year.

§11-13M-8.

...(d) *Mergers.* --

...(2) The amount of credit available in any taxable year during which a merger occurs shall be apportioned between the predecessor eligible taxpayer and the successor eligible taxpayer based on the number of days during the taxable year that each taxpayer acted as the legal employer of employees holding the new jobs upon which the credit allowed under this article is based and the number of days during the taxable year that each owned the transferred business assets: *Provided,* That when the taxable year of the predecessor eligible taxpayer and the taxable year of the successor eligible taxpayer are different, the apportionment shall be made in accordance with legislative rules prescribed by the tax commissioner...

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

VIII. OTHER.

Counsel has two minor technical modifications to suggest.