

**WEST VIRGINIA  
SECRETARY OF STATE  
JOE MANCHIN, III  
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In this Box

FILED

2003 DEC 16 P 2:31

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE**

AGENCY: Tax Division TITLE NUMBER: 110

RULE TYPE: Legislative CITE AUTHORITY W. Va. Code § 11-10-5

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 RULE BEING PROPOSED: 15G

TITLE OF RULE BEING PROPOSED: Consumer Sales and Service and Use Tax

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON January 21, 2004 AT noon. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Tax Division

Building 1, Room 300W

State Capitol Complex

Charleston, WV 25305

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

  
John C. Musgrave, Acting Secretary of Tax and Revenue

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

\$4.00

**TITLE 110  
PROPOSED LEGISLATIVE RULE  
STATE TAX DEPARTMENT  
SERIES 15G**

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE December 16, 2003  
ADMINISTRATIVE LAW DIVISION

**CONSUMERS SALES AND SERVICE TAX AND USE TAX**

**§ 110-15G-1. General.**

1.1. **Scope.** – This legislative rule clarifies that after December 31, 2003, durable medical goods, mobility enhancing equipment and prosthetic devices sold to or for the patient pursuant to a prescription written by a person licensed to prescribe drugs are exempt from West Virginia consumers sales and use taxes.

1.2. **Authority.** – W. Va. Code § 11-10-5.

1.3. **Filing Date.** – December 16, 2003.

1.4. **Effective Date.** – \_\_\_\_\_.

**§110-15G-2. Exemption from tax.**

Sales of drugs, durable medical goods, mobility enhancing equipment and prosthetic devices to a purchaser upon a prescription of a physician or dentist, and any other professional person licensed to prescribe drugs in this State, are exempt from consumers sales and use tax both before and after December 31, 2003.

**§ 110-15G-3. Definitions.**

For purposes of this rule:

3.1. “Alcoholic beverage” is defined in W. Va. Code § 11-15B-2(b)(3) and means beverages that are suitable for human consumption and contain one-half of one percent or more of alcohol by volume.

3.2. “Food and food ingredients” is defined in W. Va. Code § 11-15B-2(b)(16) and means substances, whether in liquid, concentrated, solid, frozen, dried or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. “Food and food ingredients” does not include alcoholic beverages or tobacco.

3.3. “Dietary supplement” is defined in W. Va. Code § 11-15B-2(b)(10) and means any product, other than “tobacco,” intended to supplement the diet that:

a. Contains one or more of the following dietary ingredients:

1. A vitamin;
2. A mineral;
3. A herb or other botanical;
4. An amino acid;
5. A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or
6. A concentrate, metabolite, constituent, extract or combination of any ingredient described in subparagraph (i) through (v) of this subdivision;

b. Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and

c. Is required to be labeled as a dietary supplement, identifiable by the "Supplemental Facts" box found on the label as required pursuant to 21 C.F.R. §101.36, or in any successor section of the code of federal regulations.

3.4. "Drug" is defined in W. Va. Code § 11-15B-2(b)(12) and means a compound, substance or preparation, and any component of a compound, substance or preparation, other than food and food ingredients, dietary supplements or alcoholic beverages:

a. Recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, and supplement to any of them;

b. Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans; or

c. Intended to affect the structure or any function of the human body.

3.5. "Durable medical equipment" is defined in W. Va. Code § 11-15B-2(b)(13) and means equipment including repair and replacement parts for the equipment, but does not include "mobility enhancing equipment," which:

a. Can withstand repeated use;

b. Is primarily and customarily used to serve a medical purpose;

- c. Generally is not useful to a person in the absence of illness or injury; and
- d. Is not worn in or on the body.

3.6. "Mobility enhancing equipment" is defined in W. Va. Code § 11-15B-2(b)(20) and means equipment, including repair and replacement parts to the equipment, but does not include "durable medical equipment," which:

- a. Is primarily and customarily used to provide or increase the ability to move from one place to another and which is appropriate for use either in a home or a motor vehicle;
- b. Is not generally used by persons with normal mobility; and
- c. Does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer.

3.7. "Prescription" is defined in W. Va. Code § 11-15B-2(b)(26) and means an order, formula or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to issue prescriptions.

3.8. "Prosthetic device" is defined in W. Va. Code § 11-15B-2(b)(29) and means a replacement, corrective, or supportive device including repair and replacement parts for same worn on or in the body to:

- a. Artificially replace a missing portion of the body;
- b. Prevent or correct physical deformity or malfunction; or
- c. Support a weak or deformed portion of the body.

3.9. "Tobacco" is defined in W. Va. Code § 11-15B-2(b)(44) and means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

**RULE SUMMARY**  
**110 C.S.R. 15G**

**CONSUMER SALES AND SERVICE TAX AND USE TAX**

This legislative rule clarifies that after December 31, 2003, durable medical goods, mobility enhancing equipment and prosthetic devices sold to or for the patient pursuant to a prescription written by a person licensed to prescribe drugs are exempt from West Virginia consumers sales and use taxes.

An emergency legislative rule was filed with the Secretary of State and Legislative Rule-Marking Review Committee.

## **STATEMENT OF FACTS AND CIRCUMSTANCES AND BRIEF SUMMARY**

During the 2003 legislative session H.B. 3014 was enacted, which amends West Virginia's consumers sales and use tax laws by incorporating into those laws various provisions of the Streamlined Sales and Use Tax Agreement and amending provisions of the then current law to conform to requirements of the Streamlined Sales and Use Tax Agreement. One such requirement is that, when a term is specifically defined in the Agreement, member states are required to use that definition when the term is used in State's sales and use tax laws and administrative regulations or rules. Terms defined in the Agreement include, but are not limited to, "durable medical goods," "drugs," "mobility enhancing equipment," "prescription," and "prosthetic devices."

H. B. 3014 passed March 5, 2003. It took effect June 3, 2003, but internal effective date provisions largely prevent it from being operational beginning January 1, 2004. H. B. 3014 amended West Virginia's consumers sales and use tax laws by including the Streamlined Sales and Use Tax Agreement definition for "durable medical goods," "drugs," "mobility enhancing equipment," "prescription," "prosthetic devices," and other terms. The bill deleted the definition of "drug" then found in W. Va. Code § 11-15-2(f). The Legislature also passed S. B. 531 on March 8, 2003. This bill took effect June 6, 2003, and amended and reenacted sections 11-15-2 and 11-15-9 of the consumers sales and service tax. S. B. 531 amended and reenacted section 11-15-2, as passed by the Legislature in H. B. 3014. W. Va. Code § 11-15-33, which was amended and reenacted in H.B. 3014, provides that the provisions of the consumers sales and service tax "amended or added during the regular legislative session in the year two thousand three shall take effect the first day of January two thousand four, and apply to all sales made on or after that date and to all returns and payments due on or after that day."

In enacting these bills, the Legislature never intended to repeal the exemption for appliances dispensed upon a prescription of a physician or dentist or other person licensed to prescribe drugs in this State. The title to these bills provides no indication that the exemption for durable medical goods, mobility enhancing equipment and prosthetic devices dispensed upon prescription was being eliminated.

The unintended consequence of deleting the definition of "drug" in W. Va. Code § 11-15-2(f), without amending the exemption in W. Va. Code § 11-15-9(a)(11), is that appliances dispensed upon prescription after December 31, 2003, appear to be taxable.

This emergency rule is necessary for the immediate preservation of public peace, health, safety or welfare and to prevent substantial harm to the public interest by ensuring that the exemption for drugs and insulin provided in subdivision 11-15-9(a)(11) continues to be administered and applied like it was administered and applied before enactment of H. B. 3014 and S.B. 531. This rule is also necessary to assure vendors who dispense prescription drugs, as defined in W. Va. Code § 11-15-2(f), after December 31, 2003, that they do not need to collect sales tax and that they will not be held personally liable for not collecting sales tax on durable medical goods, mobility enhancing equipment and prosthetic devices dispensed upon prescription.

## QUESTIONNAIRE

*(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and, if needed, Emergency and Modified Rule.)*

DATE: December 16, 2003

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.)

Tax Division, Dept. of Tax and Revenue

Building 1, Room 300W

State Capitol Complex, Charleston West Virginia 25305

LEGISLATIVE RULE TITLE: 110 C.S.R. Series 15G

1. Authorizing statute(s) citation W. Va. Code § 11-10-5

2. a. Dale filed in State Register with Notice of Hearing or Public Comment Period:  
December 16, 2003

b. What other notice, including advertising, did you give of the hearing?  
None

c. Date of Public Hearing(s) or Public Comment Period ended:  
January 21, 2004

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.  
Attached \_\_\_\_\_ No comments received \_\_\_\_\_

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)  
\_\_\_\_\_

- f. **Name, title, address and phone/fax/email numbers** of agency person(s) to receive all written correspondence regarding this rule: (Please type)

Rebecca Melton Craig, Tax Commissioner 558-0751

State Tax Department

Building 1, Room 300W, State Capitol Complex, Charleston, WV 25305

- g. **IF DIFFERENT FROM ITEM '2-f', please give Name, Title, Address and Phone Number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Dale W. Steager, General Counsel 558-3356

Department of Tax and Revenue

Building 1, Room 300W, State Capitol Complex, Charleston, WV 25305

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

- b. Date of hearing or comment period:

- c. On what date did you file in the State Register the findings and determinations required together with the reasons therefore?

- d. Attach findings and determinations and reasons:

Attached \_\_\_\_\_

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 110 Series 15G

Type of Rule:  Legislative \_\_\_ Interpretive \_\_\_ Procedural

1. Effect of Proposed Rule

	Annual Increase	Annual Decrease	Fiscal Year Current	Fiscal Year Next	Fiscal Year Thereafter
Estimated Total Cost	\$0	\$0	\$0	\$0	\$0
Personal Services	\$0	\$0	\$0	\$0	\$0
Current Expense	\$0	\$0	\$0	\$0	\$0
Repairs & Alterations		\$0	\$0	\$0	\$0
Equipment	\$0	\$0	\$0	\$0	\$0
Other	\$0	\$0	\$0	\$0	\$0

2. Explanation of above estimates:

As indicated above, there is no cost associated with the clarification of the Consumers Sales and Service Tax and Use Tax exemption for durable medical goods, mobility enhancing equipment and prosthetic devices. The clarification ensures that the exemption for durable medical goods, mobility enhancing equipment and prosthetic devices continues to be administered and applied like it was administered and applied before January 1, 2004.

3. Objectives of these rules:

The rule clarifies an exemption from the Consumers Sales and Service Tax and Use Tax.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None.

B. Economic Impact on Political Subdivision; Specific Industries; Specific Groups of Citizens.

None.

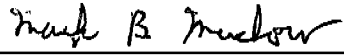
Rule Title: Title 110 Series 15G

C. Economic Impact on Citizens/Public at Large.

None.

Date:

Signature of Agency Head or authorized Representative



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Mark B. Muchow, Chief Administrator for Revenue Operations