

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

Form #7

Do not mark in this box
Filing Date

FILED

2003 DEC 16 P 2:35

OFFICE WEST VIRGINIA
SECRETARY OF STATE
Effective Date

NOTICE OF AN EMERGENCY RULE

AGENCY: Tax Division TITLE NUMBER: 110

CITE AUTHORITY W. Va. Code § 11-10-5

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

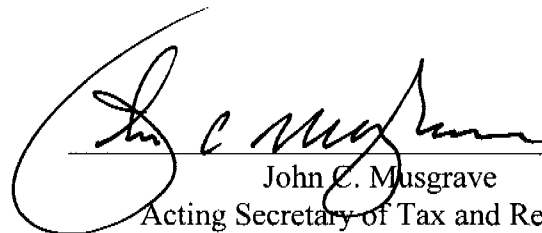
TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 15G

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

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:


John C. Musgrave
Acting Secretary of Tax and Revenue

Use additional sheets if necessary

\$4.00

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

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

CONSUMERS SALES AND SERVICE TAX AND USE TAX

§ 110-15G-1. General.

1.1. **Scope.** – This emergency 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.

EMERGENCY RULE QUESTIONNAIRE

DATE: December 16, 2003

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Tax Division, Department of Tax and Revenue
Building 1, Room 300W
State Capitol Complex, Charleston, WV 25305

EMERGENCY RULE TITLE: 110 C.S.R. 15G

1. Date of filing December 16, 2003

2. Statutory authority for promulgating emergency rule:
W. Va. Code § 11-10-5

3. Date of filing of proposed legislative rule: December 16, 2003

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? Rule adopts new language

5. Has the same or similar emergency rule previously been filed and expired?
No.

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.
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."

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

N/A

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

See answer to question 6.

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.

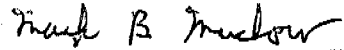
Rule Title: Title 110 Series 15G

C. Economic Impact on Citizens/Public at Large.

None.

Date:

Signature of Agency Head or authorized Representative



Mark B. Muchow, Chief Administrator for Revenue Operations