WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION
Form #2

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: STATE TAX DIVISION TITLE NUMBER: 110

RULE TYPE: LEGISLATIVE ; CITE AUTHORITY W.VA. CODE § 11-10-5

AMENDMENT TO AN EXISTING RULE: YES X NO ___

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 23

TITLE OF RULE BEING AMENDED: BUSINESS FRANCHISE TAX

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: ___

TITLE OF RULE BEING PROPOSED: ___

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 AUGUST 1, 1991 AT 5:00 P.M. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

LEGAL DIVISION
DEPARTMENT OF TAX AND REVENUE
P. O. BOX 1005
CHARLESTON, WV 25324-1005

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

L. Frederick Williams

L. FREDERICK WILLIAMS, JR.
STATE TAX COMMISSIONER

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

State of West Virginia
Department of Tax and Revenue
Charleston 25305

GASTON CAPERTON
GOVERNOR

L. FREDERICK WILLIAMS, JR.
SECRETARY

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SECRETARY OF STATE

CONSENT TO FILE RULE

July 1, 1991

To Whom It May Concern:

Title of Rule:	Business Franchise Tax
Title Number:	110
Series Number:	23

Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this 1st day of July, 1991.

L. Frederick Williams

L. Frederick Williams, Jr.
Secretary, Tax and Revenue

State of West Virginia
Department of Tax and Revenue
Charleston 25305

GASTON CAPERTON
GOVERNOR

L. FREDERICK WILLIAMS, JR.
SECRETARY

STATEMENT OF CIRCUMSTANCES

Aside from the need for technical corrections, the amended regulations clarify the taxation of financial organizations which was enacted by the Legislature during the 1991 regular session and establish successor liability for taxes.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Business Franchise Tax

Type of Rule: X Legislative ____ Interpretive ____ Procedural

Agency: State Tax Division Address: State Capitol; Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL Increase	ANNUAL Decrease	FISCAL YEAR Current	FISCAL YEAR Next	FISCAL YEAR Thereafter
Estimated Total Cost	$	$	$	$	$
Personal Services	-0-	-0-	-0-	-0-	-0-
Current Expense	-0-	-0-	-0-	-0-	-0-
Repairs and Alterations	-0-	-0-	-0-	-0-	-0-
Equipment	-0-	-0-	-0-	-0-	-0-
Other	-0-	-0-	-0-	-0-	-0-

2. Explanation of above estimates:

There should be no fiscal impact upon the expenses of the State Tax Division.

3. Objectives of these rules:

The amendments include the taxationof financial organization, the development of successor liability, and technical corrections.

4. Explanation of Overall Economic Impact of Proposed Rule.
   A. Economic Impact on State Government.

The economic impact should not differ from that envisioned by the Legislature when it amended the Code.

   B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

There may be an economic impact on financial organizations.

   C. Economic Impact on Citizens/Public at Large.

There should be no economic impact.

Date: July 1, 1991

Signature of Agency Head or Authorized Representative

L. Frederick Williams

L. Frederick Williams, Jr.
Secretary, Tax and Revenue

PROPOSED
WEST VIRGINIA LEGISLATIVE REGULATIONS
DEPARTMENT OF TAX AND REVENUE
TITLE 110
SERIES 23
1991

BUSINESS FRANCHISE TAX

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§ 110-23-1. General.

1.1 Type of regulation. - These regulations are proposed legislative regulations as defined in W. Va. Code § 29A-3-1 et seq.

1.2 Scope. - These proposed legislative regulations explain and clarify the West Virginia Business Franchise Tax set forth at W. Va. Code § 11-23-1 et seq.

1.3 Authority. - W. Va. Code § 11-10-5.

1.4 Filing date. -

1.5 Effective date. -

1.6 Citation. - These proposed regulations may be cited as 110 C.S.R. 23, ____ (1991).

§ 110-23-2. General Overview.

2.1 The business franchise tax is imposed on partnerships, as defined in Section 3.19 of these regulations, and corporations, as defined in Section 3.8 of these regulations, beginning July 1, 1987. The tax is imposed upon the privilege of doing business in the State of West Virginia or owning or leasing property having its business situs in the State. The tax is not an ad valorem property tax.

2.2 The measure of tax is the "capital" of the partnership or corporation, as defined in Section 3.4 of these regulations. If the taxpayer is taxable in more than one state, its capital must be apportioned using a four factor formula (property payroll and sales) in which the sales factor is double weighted and the denominator is four. The tax rate is .75 percent of the adjusted and apportioned capital of the taxpayer. The minimum tax is fifty dollars ($50.00).

2.3 The tax is an annual tax, ninety percent (90%) of which must be remitted in installment payments during the taxable year by taxpayers having an estimated tax liability of more than twelve thousand dollars ($12,000.00). The taxable year is the same as the taxpayer's taxable year for federal income tax purposes. In the case of calendar year taxpayers, the annual return of corporations is due on March 15th of the next taxable year, and the annual return of partnerships is due on April 15th of the next taxable year. Declarations of estimated tax are due from calendar year taxpayers on April 15th of the current taxable year, at which time one-fourth (1/4) of the estimated tax must be remitted. Remaining installment payments are due June 15th, September 15th and December 15th for such calendar year taxpayers.

2.4 Credit is allowed against the tax for the payment of West Virginia bank shares taxes. Credit is also allowed for West Virginia business franchise taxes paid by subsidiaries, and credit is allowed for business and occupation tax paid.

2.5 Certain partnerships and corporations are exempt from the tax. This includes entities exempt from federal income taxes; insurance companies which pay the State premiums tax; farming partnerships and corporations and joint ventures which are not required to file federal partnership income tax returns under Section 761 of the Internal Revenue Code.

2.6 The business franchise tax is administered under the West Virginia Tax Procedure and Administration Act, W. Va. Code § 11-10-1 et seq. Criminal penalties applicable with regard to administration of the business franchise tax are found in the West Virginia Tax Crimes and Penalties Act, W. Va. Code § 11-9-1 et seq.

§ 110-23-3. Definitions.

3.1 General. - When used in these regulations, terms defined in this Section shall have the meanings ascribed to them herein unless a different meaning is clearly required by either the context in which the term is used, or by specific definition.

3.2 Business franchise tax act. - The term "Business Franchise Tax Act" means Article 23, Chapter 11 of the West Virginia Code of 1931, as amended.

3.3 Business income. - The term "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property or the rendering of services in connection therewith constitute integral parts of the taxpayer's regular trade or business operations.

3.4 Capital. - The term "capital" of a taxpayer means:

3.4.1 In the case of corporations, except an electing small business corporation, the average of the beginning and ending year balances of the sum of the following entries from Schedule L of the "Federal Form 1120," prepared following generally accepted accounting principles, and as filed by the taxpayer with the Internal Revenue Service for the taxable year:

3.4.1.1 The amount or value of all common and preferred stock of the taxpayer;

3.4.1.2 The amount of paid-in or capital surplus;

3.4.1.3 The amount of retained earnings, appropriated and unappropriated;

3.4.1.4 Less the cost of treasury stock.

3.4.2 S Corporations. - In the case of an electing small business corporation, the average of the beginning and ending year balances of the sum of the following entries from Schedule L of the Federal Form 1120S, prepared following generally accepted accounting principles, and as filed by the taxpayer with the Internal Revenue Service for the taxable year:

3.4.2.1 The amount of all common and preferred stock of the taxpayer;

3.4.2.2 The amount of paid-in or capital surplus;

3.4.2.3 The amount of retained earnings, appropriated and unappropriated;

3.4.2.4 The amount of shareholders' undistributed taxable income;

3.4.2.5 The amount of the accumulated adjustments accounts;

3.4.2.6 The amount of the other adjustments account;

3.4.2.7 Less the cost of treasury stock.

3.4.3 Partnerships. - In the case of a partnership, the average of the beginning and ending year balances of the amount or value of partners' capital accounts from Schedule L of Federal Form 1065, prepared following accepted accounting principles, and as filed by the taxpayer with the Internal Revenue Service for the taxable year.

3.4.4 In circumstances where the Schedule L of Federal Form 1120, 1120S or 1065, as filed with the United States Internal Revenue Service, has not been prepared in accordance with generally accepted accounting principles, the taxpayer shall file a copy of such Schedule L with the State Tax Department, adjusted in accordance with the requirements of the Tax Commissioner under Section 11-23-3(b)(2)(D) of the West Virginia Code, and Section 3.4.5 of these regulations, if such adjustment is required. The taxpayer shall not be required to file with the West Virginia Tax Department a Schedule L of Federal Form 1120, 1120S or 1065 prepared in accordance with generally accepted accounting principles, except for the adjustments specified under Section 11-23-3(b)(2)(D) of the West Virginia Code, and Section 3.4.5 of these regulations, if any, for purposes of the West Virginia Business Franchise Tax, unless the taxpayer has filed such Schedule L, prepared in accordance with generally accepted accounting principles, for federal income tax purposes with the United States Internal Revenue Service for the taxable year.

3.4.5 Additional Items in Capital. - The term "capital" for purposes of the business franchise tax includes such adjustments as the Tax Commissioner deems necessary to properly reflect capital and such additional items from the accounts of the taxpayer as the Tax Commissioner may by regulation prescribe, which fairly represent the net equity of the taxpayer as defined in accordance with generally accepted accounting principles.

3.4.6 Allowance for Certain Government Obligations and Obligations Secured by Residential Property. - As to both corporations and partnerships, capital must be multiplied by a fraction equal to one minus a fraction:

3.4.6.1 The numerator of which is the average of the monthly beginning and ending account balances during the taxable year (account balances to be determined at cost in the same manner as obligations, investments and loans are reported on Schedule L of the "Federal Form 1120" or Federal Form 1065) of the following:

3.4.6.1.a Obligations and securities of the United States, or of any agency, authority, commission or instrumentality of the United States and any other corporation or entity created under the authority of the United States Congress for the purpose of implementing or furthering an objective of national policy;

3.4.6.1.a.1 The term "obligation," for purposes of subsection 3.4.6.1.a, means a direct obligation of one of the enumerated entities issued under law for valuable consideration, and includes bonds, notes, certificates of indebtedness, Treasury bills, and interim certificates issued for an obligation. It does not include, for example, an overpayment of federal income tax.

3.4.6.1.a.2 The term "obligations and securities of the United States or any agency, authority, commission or instrumentality of the United States and any other corporation or entity created under the authority of the United States Congress for the purpose of implementing or furthering an objective of national policy" means securities of any such agency, authority, commission, instrumentality, corporation or entity; or direct obligations of the United States government or any such agency, authority, commission, instrumentality, corporation or entity whereby any such entity is the obligor. Obligations or securities for which the federal government or any such agency, authority, commission, instrumentality, corporation or entity acts as a mere guarantor, rather than the direct obligor, shall not constitute obligations or securities of the United States or any such agency, authority, commission, instrumentality, corporation or entity for purposes of the West Virginia business franchise tax and these regulations.

3.4.6.1.a.3 Example: Financial instruments issued by private institutions obliged to make timely payment of principal and interest which are guaranteed by a federal agency that pledges the full faith and credit of the United States to guarantee the timely payment of interest and principal if the issuer defaults are not obligations of the United States or any agency, authority, commission or instrumentality of the United States or any corporation or entity created under the authority of the United States Congress. The federal agency bears only a secondary and contingent obligation to pay, and thus is a guarantor rather than an obligor.

3.4.6.1.b Obligations of the State of West Virginia or any political subdivision of the State of West Virginia;

3.4.6.1.c Investments or loans primarily secured by mortgages, or deeds of trust, on residential property located in the State of West Virginia and occupied by nontransients;

3.4.6.1.c.1 The term "residential property" means an abode and dwelling for human habitation intended to be inhabited for a permanent or indeterminate and lengthy period of time. The term does not include hotels, motels, inns, motor inns, lodges and similar short-term lodging accommodations, but does include apartments, condominiums, single family dwellings, multiple family dwellings, apartment complexes, nursing homes and housing developments. This term shall include property primarily used as such an abode and dwelling without regard to whether the property is also used for commercial purposes, so long as it is primarily used as a residence.

3.4.6.1.c.2 The term "nontransient" means natural persons, rather than corporations, who own their residence or who have a lease for their residence which has a primary term of not less than ninety (90) days or such persons who hold a weekly or monthly periodic tenancy or a tenancy at will in their residence but who have resided at the residence for a period of more than eighty-nine (89) days.

3.4.6.1.d And loans primarily secured by a lien or security agreement on residential property in the form of a mobile home, modular home or double-wide, located in the State of West Virginia and occupied by nontransients.

3.4.6.1.d.1 For purposes of this subsection, the term "lien or security agreement" shall include a uniform commercial code security interest agreement.

3.4.6.1.3 The term "investments or loans primarily secured by mortgages or deeds of trust, on residential property" shall include construction loans for the construction of residential property so secured.

3.4.6.2 The denominator of which is the average of the monthly beginning and ending account balances of the total assets of the taxpayer which are shown on Schedule L of the "Federal Form 1120," as filed by the taxpayer with the Internal Revenue Service or, in the case of partnerships, Schedule L of Federal Form 1065, as filed by the taxpayer with the Internal Revenue Service, or in the case of taxpayers not required to file such schedules or forms with the Internal Revenue Service, the pro forma version thereof.

3.4.6.3 For purposes of this regulation, the average of the monthly beginning and ending account balances shall be determined for any given account by adding the account balance on the first day of the month to the account balance on the last day of the month and dividing the resulting sum by two. The averages resulting from this procedure shall, for each of the twelve (12) months of the taxable year, or, in the case of short taxable years for the number of months in the taxable year, be added together, and the sum shall then be divided by twelve (12) in the case of taxable years having twelve (12) months, or shall be divided by the number of months in the taxable year for short taxable years. The resulting figure shall be the average of the monthly beginning and ending balance for any account described under this Section 3 of the these regulations.

3.4.6.3.a When a taxpayer maintains records insufficient to clearly establish the monthly beginning and ending account balances, the average of the monthly beginning and ending account balances shall be deemed to be zero unless the taxpayer can otherwise affirmatively establish to the satisfaction of the Tax Commissioner the amount of the average monthly beginning and ending account balances.

3.5 Commercial domicile. - The term "commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed: **Provided**, That the commercial domicile of a financial organization, which is subject to regulation as such, shall be at the place designated as its principal office with its regulating authority.

3.5.1 The term "directed or managed" for purposes of these regulations shall mean the guidance and control exerted by the executive officers or managerial authorities of a corporation over the business affairs of the corporation. In the case of parent and subsidiary corporations or other related or affiliated corporations, any direction, management, guidance or control exerted by the executive officers or managerial authorities of parent corporations over or upon subsidiary corporations or the management thereof, or by the executive officers or managerial authorities of related or affiliated corporations over or upon other related or affiliated corporations or the management thereof, shall not constitute the direction or management of the corporation for purposes of the West Virginia business franchise tax or these regulations.

3.6 Commissioner or Tax Commissioner. - The terms "Commissioner" or "Tax Commissioner" are used interchangeably in these regulations, and mean the Tax Commissioner of the State of West Virginia, or his delegate.

3.7 Compensation. - The term "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

3.8 Corporation. - The term "corporation" includes any corporation, S corporation, joint-stock company and any association or other organization which is taxable as a corporation under federal income tax laws or the income tax laws of West Virginia, or which is treated as an S corporation under federal income tax law.

3.9 Delegate. - The term "delegate" in the phrase "or his delegate," when used in reference to the Tax Commissioner, means any officer or employee of the State Tax Department duly authorized by the Tax Commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in W. Va. Code § 11-23-1 et seq. or these regulations.

3.10 Doing business. - The term "doing business" means any activity of a corporation or partnership which enjoys the benefits and protection of the government and laws of the State of West Virginia, except the activities of agriculture and farming.

3.10.1 For purposes of these regulations, the terms "agriculture" and "farming" shall mean the production of food, fiber, and woodland products (but not timbering activity) by means of cultivation, tillage of the soil and by the conduct of animal, livestock, dairy, apiary, equine or poultry husbandry, horticultural, or any other plant or animal production activity and all farm practices related, usual or incidental thereto, including the storage, packing, shipping and marketing of agricultural or farm products, but not including any manufacturing, milling or processing of such products by persons other than the producer thereof.

3.10.2 The activities of agriculture and farming shall mean such activities, as defined herein, occurring on not less than five (5) acres of land and the improvements thereon, used in the aforementioned activities, and shall mean only such agriculture and farming activities resulting in the production of at least one thousand dollars ($1,000.00) of agriculture or farming products per annum through the conduct of the business of farming as the principal activity of the corporation or partnership in the manner described in Section ten, Article one-a, Chapter eleven of the West Virginia Code and the regulations related thereto.

3.11 Domestic corporation. - The term "domestic corporation" means a corporation organized under the laws of the State of West Virginia, and certain corporations organized under the laws of the State of Virginia before the twentieth day of June, 1863. Every other corporation is a foreign corporation.

3.12 Federal Form 1120. - The term "Federal Form 1120" means the annual federal income tax return of any corporation made pursuant to the United States Internal Revenue Code of 1986, as amended, or in successor provisions of the laws of the United States in respect to the taxable income of a corporation, and filed with the Federal Internal Revenue Service. In the case of a corporation that elects to file a federal income tax return as part of an affiliated group, but files as a separate corporation under the Business Franchise Tax Act, then as to such corporation, the term "Federal Form 1120" means the pro forma Federal Form 1120. In the case of S corporations, the term "Federal Form 1120" means Federal Form 1120S.

3.12.1 For purposes of the West Virginia business franchise tax and these regulations, the term "Federal Form 1120" shall mean a pro forma Federal Form 1120 for those corporations not required by federal law to file a Federal Form 1120.

3.12.2 The term "Schedule L of Federal Form 1120" shall mean the balance sheet required to be filed with the federal income tax return, whether designated Schedule L or otherwise. For those corporations not required by federal law to file a "Federal Form 1120" or a balance sheet, whether designated Schedule L or otherwise, with their federal income tax return, the term "Schedule L of Federal Form 1120" shall mean the pro forma Schedule L of Federal Form 1120.

3.13 Federal Form 1065. - The term "Federal Form 1065" means the annual federal income tax return or filing of a partnership made pursuant to Section 6031 of the United States Internal Revenue Code of 1986, as amended, or renumbered, or in successor provisions of the laws of the United States in respect to the income of a partnership, and filed with the Internal Revenue Service.

3.13.1 For purposes of the West Virginia business franchise tax and these regulations, the term "Federal Form 1065" shall mean a pro forma Federal Form 1065 for those partnerships not required by federal law to file a Federal Form 1065.

3.13.2 The term "Schedule L of Federal Form 1065" shall mean the balance sheet required to be filed with the federal partnership tax return or filing, whether designated Schedule L or otherwise. For those partnerships not required by federal law to file a Federal Form 1065 or a balance sheet, whether designated Schedule L or otherwise, with their federal partnership return, the term "Schedule L of Federal Form 1065" shall mean the pro forma Schedule L of Federal Form 1065.

3.14 Fiduciary. - The term "fiduciary" means, and includes, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person.

3.15 Financial organization. - The term "financial organization" ~~includes any bank, banking association, trust company, industrial loan company, small loan company or licensee, building and loan association, savings and loan association, finance company, investment company, investment broker or dealer, and any other similar business organization, at least ninety (90) percent of the assets of which consist of intangible personal property, and at least ninety (90) percent of the gross receipts of which consist of dividends, interest and other charges derived from the use of money or credit~~ means:

3.15.1 A holding company or a subsidiary thereof. As used in this section "holding company" means a corporation registered under the federal bank holding company act of 1956 or registered as a savings and loan holding company other than a diversified savings and loan holding company (as defined in section 408(a)(1)(F) of the Federal National Housing Act (12 U.S.C. 1730(a)(1)(F));

3.15.2 A regulated financial corporation or a subsidiary thereof. As used in this section "regulated financial corporation" means:

3.15.2.1 An institution, the deposits, shares or accounts of which are insured under the Federal Deposit Insurance Act, or by the Federal Savings and Loan Insurance Corporation;

3.15.2.2 An institution that is a member of a federal home loan bank;

3.15.2.3 Any other bank or thrift institution incorporated or organized under the laws of a state that is engaged in the business of receiving deposits;

3.15.2.4 A credit union incorporated and organized under the laws of this state;

3.15.2.5 A production credit association organized under 12 U.S.C. 2071;

3.15.2.6 A corporation organized under 12 U.S.C. 611 through 631 (an Edge Act corporation); or

3.15.2.7 A federal or state agency or branch of foreign bank (as defined in 12 U.S.C. 3101); or

3.15.3 A corporation which derives more than fifty percent of its gross business income from one or more of the following activities:

3.15.3.1 Making, acquiring, selling or servicing loans or extensions of credit. Loans and extensions of credit include:

3.15.3.1.1 Secured or unsecured consumer loans;

3.15.3.1.2 Installment obligations;

3.15.3.1.3 Mortgages or other loans secured by real estate or tangible personal property;

3.15.3.1.4 Credit card loans;

3.15.3.1.5 Secured and unsecured commercial loans of any type; and

3.15.3.1.6 Loans arising in factoring.

3.15.3.2 Leasing or acting as an agent, broker or advisor in connection with leasing real and personal property that is the economic equivalent of an extension of credit (as defined by the Federal Reserve Board in 12 C.F.R. 225.25(b)(5)).

3.15.3.3 Operating a credit card business.

3.15.3.4 Rendering estate or trust services.

3.15.3.5 Receiving, maintaining or otherwise handling deposits.

3.15.3.6 Engaging in any other activity with an economic effect comparable to those activities described in Section 3.15.3.1, 3.15.3.2, 3.15.3.3, 3.15.3.4 or 3.15.3.5 of the regulations.

3.16 Fiscal year. - The term "fiscal year" means an accounting period of twelve (12) months ending on any day other than the last day of December, and on the basis of which the taxpayer is required to report for federal income tax purposes.

3.17 Includes and including. - The terms "includes" and "including" when used in a definition contained in this article shall not be deemed to exclude other things otherwise within the meaning of the term being defined.

3.18 Parent and subsidiary corporation. - A "parent corporation" is a corporation which owns, directly or indirectly, on average during the taxable year more than fifty percent (50%) of the stock of all classes of another corporation. A corporation which is so-owned by a parent corporation is defined to be a "subsidiary corporation." The types of ownership interest which will qualify corporations as parent and subsidiary corporations shall include direct and indirect ownership interests among members of the same controlled group as defined in Section 267(f)(1) of the United States Revenue Code of 1986, as amended.

3.19 Partnership and partner. - The term "partnership" 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, and which is not a trust or estate, a corporation or a sole proprietorship, or an unincorporated organization which, under Section 761 of the Internal Revenue Code of 1986, as amended, is not treated as a partnership for the taxable year for federal income tax purposes. The term "partner" includes a member in such a syndicate, group, pool, joint venture or organization which is a partnership.

3.19.1 The term "partnership" and the term "partner" shall not include any joint venture or joint venturer that has elected under Section 761 of the United States Internal Revenue Code not to report as a partnership for federal income tax purposes.

3.19.2 The term "partner," "corporate partner" or the term "parent-partner" means and includes a corporation owning an interest in a partnership as a general or limited partner.

3.20 Person. - The term "person" includes any corporation or partnership.

3.21 Pro forma return. - The term "pro forma return," when used in these regulations, means the return which a taxpayer would have filed with the Internal Revenue Service had it not elected to file as part of a consolidated group for federal income tax purposes.

3.21.1 Pro forma statements, forms, schedules or documents. - The term "pro forma" when applied to statements, forms, schedules or documents means that statement, form, schedule or document drawn up or drafted to conform to the applicable rules, regulations, informational requirements and format for the statement, form, schedule or document upon which the pro forma statement, form, schedule or document is to be based as if the taxpayer were required to file such statement, form, schedule or document for federal income tax purposes and in accordance with federal income tax law.

3.22 Sales. - The term "sales" means all gross receipts of the taxpayer which are "business income," as defined in these regulations.

3.23 State. - The term "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States, and any foreign country or political subdivision thereof.

3.24 Stock. - The term "stock" includes shares in a corporation, association or joint stock company. The term does not include nonvoting stock which is limited and preferred as to dividends, or treasury stock. The term "stock owned by a corporation" shall include stock owned directly by such corporation and stock which is subject to an option to acquire stock.

3.25 Taxable year. - The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the taxpayer's tax liability is computed under the Business Franchise Tax Act. The term "taxable year" means, in the case of a return made for a fractional part of a year (short taxable year) under the provisions of the Business Franchise Tax Act, or under these regulations, the period for which such return is made.

3.25.1 The term "taxable year for federal income tax purposes" or the term "filing year for federal income tax purposes" means the fiscal or calendar year for which the taxpayer is required to report for federal income tax purposes in accordance with federal income tax law for purposes of the annual federal income tax return or for purposes of federal informational returns.

3.26 Taxable in another state. - The term "taxable in another state" for purposes of apportionment under Section 110-23-5 of these regulations means those circumstances where a taxpayer:

3.26.1 Is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax in such other state; or

3.26.2 Would be subject to a net income tax if such other state imposed such a tax.

3.27 Taxpayer. - The term "taxpayer" means any person as defined in these regulations subject to the tax imposed by W. Va. Code § 11-23-1 et seq.

3.28 This Code. - The term "this code" means the code of West Virginia, one thousand nine hundred thirty-one, as amended.

3.29 This State. - The term "this State" means the State of West Virginia.

3.30 Treasury stock. - The term "treasury stock" means shares of a corporation which have been issued and have been subsequently acquired by and belong to such corporation, and have not been cancelled or restored to the status of authorized but unissued shares. Treasury stock is deemed to be issued shares, but not outstanding shares.

3.31 W. Va. Code. - The term "W. Va. Code" means the Code of West Virginia of 1931, as amended.

3.32 Meaning of terms. - Any term used in these regulations shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required by the context or by definition in these regulations. Any reference in these regulations to the laws of the United States, or to the Internal Revenue

Code or to the federal income tax law shall mean the provisions of the laws of the United States relating to the determination of income for federal income tax purposes. All amendments made to the laws of the United States prior to January 1, 1989 shall be given effect in determining taxes imposed by the Business Franchise Tax Act for the tax period beginning January 1, 1988. No amendment to laws of the United States made after December 31, 1988 shall be given effect unless superseding West Virginia statutory law shall have been passed giving effect to such amendments for purposes of the West Virginia Business Franchise Tax Act.

§ 110-23-4. Tax Base Determined.

4.1 The tax base of a taxpayer, for purposes of the business franchise tax, is the taxpayer's "capital," as defined in these regulations and as adjusted in accordance with W. Va. Code § 11-23-3 and Section 3.4 of these regulations.

4.2 If the taxpayer is also taxable in another state as defined in Section 110-23-3 of these regulations, then the tax base of the taxpayer shall be its "capital," as defined in W. Va. Code § 11-23-3 and Section 3.4 of these regulations, multiplied by the said taxpayer's apportionment fraction determined under W. Va. Code § 11-23-5 and Section 110-23-5 of these regulations.

§ 110-23-5. Apportionment Of Tax Base.

5.1 A taxpayer subject to the business franchise tax which is also taxable in another state shall apportion its tax base to the State of West Virginia by multiplying its tax base by a fraction, the numerator of which is the sum of its property factor, plus the payroll factor, plus two times the sales factor, all of which shall be determined in accordance with this Section, and the denominator of which is four. However, when the denominator of one or more of the factors is zero, the denominator of the apportionment formula fraction shall be decreased by the number of factors having a denominator of zero. In the case of a sales factor which has a denominator of zero the apportionment fraction denominator shall be decreased by two.

5.2 Property factor. - The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used by it in this State during the taxable year, and the denominator of which is the average value of all real and tangible personal property owned or rented by the taxpayer and used by it during the taxable year, which is reported on Schedule L of "Federal Form 1120," or Schedule L of Federal Form 1065 for partnerships, plus the average value of all real and tangible personal property leased and used by the taxpayer during the taxable year.

5.3 Value of property. - Property owned by the taxpayer shall be valued at its original cost, adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc.: Provided, That where records of original cost are unavailable or cannot be obtained without unreasonable expense, property shall be valued at original cost as determined under Section 5.3.3 of these regulations. Property rented by the taxpayer from others shall be valued at eight times the net annual rental rate. Net annual rental rate is the annual rental paid, directly or indirectly, by the taxpayer, or for its benefit, in money or other consideration for the use of the property and includes:

5.3.1 Any amount payable for the use of real or tangible personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise;

5.3.2 Any amount payable as additional rent or in lieu of rents, such as interest, taxes, insurance, repairs or any other items which are required to be paid by the terms of the lease or other arrangement, not including amounts paid as service charges, such as utilities, janitor services, etc. If a payment includes rent and other charges unsegregated, the amount of rent shall be determined by consideration of the relative values of the rent and the other items. The term "rent" does not include incidental day-to-day expenses such as hotel or motel accommodations, daily rental of automobiles, etc.

5.3.2.1 Example 1: A taxpayer, pursuant to the terms of a lease, pays the lessor twelve thousand dollars ($12,000) a year rent plus taxes in the amount of two thousand dollars ($2,000) and interest on a mortgage in the amount of one thousand dollars ($1,000). The amount of rent is fifteen thousand dollars ($15,000).

Example 2: A taxpayer stores part of its inventory in a public warehouse. The total charge for the year was one thousand dollars ($1,000), of which seven hundred dollars ($700) was expressly for the use of storage space and three hundred dollars ($300) of which was expressly for inventory, insurance, handling and shipping charges, and C.O.D. collections. The annual rent is seven hundred dollars ($700).

Shipping and handling charges and C.O.D. charges would be for transactions entirely unrelated to the lease of storage space, and would not constitute consideration for use of the leased storage space. The cost of insurance on the lessee's property is not a responsibility of the lessor of the building, and does not relate to the leased storage space. Had the insurance fee been for insurance on the warehouse building paid pursuant to the lease, rather than for the lessee's inventory, it would have then related to the leased property and would have been a payment of an obligation of the lessor pursuant to a lease. It would then constitute consideration paid for use of the storage space, and would qualify as rent under this Section.

<u>5.3.3 Movable property. - The value of movable tangible personal property used both within and without this state shall be included in the numerator to the extent of its utilization in this state. The extent of such utilization shall be determined by multiplying the original cost of such property by a fraction, the numerator of which is the number of days of physical location of the property in this state during the taxable period, and the denominator of which is the number of days of physical location of the property everywhere during the taxable year. The number of days of physical location of the property may be determined on a statistical basis or by such other reasonable method acceptable to the Tax Commissioner.</u>

5.3.4 Where records of the original cost of property are not available, property shall be valued at original cost. The determination of original cost shall be made by determining the fair market value of the property on the date of acquisition.

5.4 Leasehold improvements. - Leasehold improvements shall, for the purposes of the property factor, be treated as property owned by the lessee regardless of whether the lessee is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Leasehold improvements shall be included in the property factor at their original cost.

5.5 Average value of property. - The average value of property shall be determined by averaging the values at the beginning and ending of the taxable year: Provided, That the Tax Commissioner may require the averaging of monthly values during the taxable year if substantial fluctuations in the values of the property exist during the taxable year or where property is acquired after the beginning of the taxable year, or is disposed of, or for which the rental contract ceases, before the end of the taxable year.

5.6 Payroll factor. - The payroll factor is a fraction, the numerator of which is the total compensation paid in the State of West Virginia during the taxable year by the taxpayer, and the denominator of which is the total compensation paid by the taxpayer during the taxable year as shown on the taxpayer's federal income tax ~~form~~ return as filed with the Internal Revenue Service, as reflected in the schedule of wages and salaries and that portion of cost of goods sold which reflects compensation, or as shown on a pro forma return.

5.7 Compensation. - The term "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or to any other person not properly classifiable as an employee shall be excluded. Only the amounts paid directly to employees shall be included in the payroll factor. Amounts which are considered paid directly to employees include the value of board, rent, housing, lodging, and other benefits or services furnished to employees by the taxpayer in return for personal services, provided such amounts constitute income to the recipient for federal income tax purposes.

5.8 Employee. - The term "employee" means:

5.8.1 Any officer of a corporation; or

5.8.2 Any individual who, under the usual common law rules applicable in determining the employer/employee relationship, has the status of an employee.

5.9 Compensation paid in this State. - Compensation is paid in this State if:

5.9.1 The employee's service is performed entirely within this State;

5.9.2 The employee's service is performed both within and outside of this State, but the service performed outside of this State is incidental to the individual's service within this State. The word "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction; or

5.9.3 Some of the service is performed in the State of West Virginia and:

5.9.3.1 The employee's base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the State of West Virginia, or

5.9.3.2 The base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the employee's residence is in the State of West Virginia. The term "base of operations" means the place of more or less permanent nature from which the employee starts his work and to which he customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of his trade or profession at some other point or points. The term "place from which the service is directed or controlled" refers to the place from which the power to direct or control is exercised by the taxpayer.

5.10 Sales factor. - The sales factor is a fraction, the numerator of which is the gross receipts of the taxpayer derived from transactions and activity in the regular course of its trade or business in the State of West Virginia during the taxable year, less returns and allowances. The denominator of the fraction is the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, and reflected in its gross income reported and as appearing on the taxpayer's "Federal Form 1120" or Federal Form 1065, and consisting of those certain pertinent portions of the gross income elements set forth. Provided, That if either the numerator or the denominator includes interest or dividends from obligations of the United States government which are exempt from taxation by this state, the amount of such interest and dividends, if any, shall be subtracted from the numerator or denominator in which it is included.

5.10.1 For purposes of these regulations, the term "gross receipts," shall mean gross income, not gross profit, and no reduction for cost of goods sold or other expenses or decreases in the amount of gross receipts shall be permitted in the determination of the sales factor.

5.11 Allocation of sales of tangible personal property. - Sales of tangible personal property are in the State of West Virginia if:

5.11.1 The property is ~~delivered or shipped to a~~ received in this state by the purchaser, other than the United States government, ~~within the State of West Virginia~~ regardless of the f.o.b. point or other conditions of the sale~~; or~~. In the case of delivery by common carrier or other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered as the place at which such property is received by the purchaser. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by the purchaser, constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by the purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale; or

5.11.2 The property is shipped from an office, store, warehouse, factory or other place of storage in the State of West Virginia, and~~.~~

~~5.11.2.1~~ ~~The~~ the purchaser is the United States government, or;

~~5.11.2.2 The taxpayer is not taxable in the state of the purchaser.~~

5.11.3 All other sales of tangible personal property delivered or shipped to a purchaser within a state in which the taxpayer is not taxed as defined in W. Va. Code § 11-24-7(b) shall be excluded from the denominator of the sales factor.

5.12 Allocation of other sales. - Sales, other than sales of tangible personal property, are in the State of West Virginia if:

5.12.1 The income producing activity is performed in the State of West Virginia; or

5.12.2 The income producing activity is performed both in and outside the State of West Virginia and a greater portion of the income producing activity is performed in the State of West Virginia than in any other state, based on costs of performance~~.~~; or

5.12.3 The sale constitutes business income to the taxpayer, or the taxpayer is a financial organization not having its commercial domicile in this state, and in either case the sale is a receipt described as attributable to this state in W. Va. Code § 11-23-5a.

5.13 Income-producing activity. -- The term "income-producing activity" applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gain or profit. Such activity does not include transactions and activities performed on behalf of the taxpayer, such as those conducted on its behalf by an independent contractor. "Income-producing activity" includes, but is not limited to, the following:

5.13.1 The rendering of personal services by employees with utilization of tangible and intangible property by the taxpayer in performing a service;

5.13.2 The sale, rental leasing, licensing or other use of real property;

5.13.3 The sale, rental, leasing, licensing or other use of tangible personal property; or

5.13.4 The sale, licensing or other use of intangible personal property. The mere holding of intangible personal property is not, itself, an income-producing activity; **Provided,** That the conduct of the business of a financial organization shall constitute an income-producing activity.

5.14 **Cost of performance.** -- The term "cost of performance" means direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer.

~~5.13~~ 5.15 Other methods of allocation.

~~5.13.1~~ 5.15.1 General. - If the statutory formula for apportionment of the tax base, as outlined above, and imposed under W. Va. Code § 11-23-5(a) and section 5.1 of these regulations, does not fairly represent the extent of the taxpayer's business activities in the State of West Virginia, the taxpayer may petition for, or the Tax Commissioner may require, in respect to all or any part of the taxpayer's business activities, if reasonable:

~~5.13.1.1~~ 5.15.1.1 Separate accounting;

~~5.13.1.2~~ 5.15.1.2 The exclusion of one of the factors;

~~5.13.1.3~~ 5.15.1.3 The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in the State of West Virginia; or

~~5.13.1.4~~ 5.15.1.4 The employment of any other method to effectuate an equitable allocation or apportionment of the taxpayer's tax base.

~~5.13.2~~ 5.15.2 A taxpayer desiring to use another method of allocation or apportionment to determine taxable "capital" must file its petition no later than the due date of the annual return for the taxable year for which the alternative method is requested (determined without regard to any extension of time for filing). ~~in which such other method will be used.~~

5.15.2.1 The petition shall include a statement of the petitioner's objections and of such alternative method of allocation or apportionment as it believes to be proper under the circumstances with such detail and proof as the Tax Commissioner may require.

~~5.13.3~~ 5.15.3 Burden of proof. - In any administrative or judicial proceeding, in which employment of one of the methods of allocation or apportionment provided for in Section ~~5.13.1~~ 5.15.1 is sought, on the ground that the statutory apportionment formula described in W. Va. Code § 11-23-5(a) and Section 5.1 of these regulations does not fairly represent the extent of the taxpayer's business activities in the State of West Virginia, the burden of proof shall:

~~5.13.3.1~~ 5.15.3.1 If the Tax Commissioner seeks employment of one of such methods, be on the Tax Commissioner, or

~~5.13.3.2~~ 5.15.3.2 If the taxpayer seeks employment of one of such other methods, be on the taxpayer.

5.15.4 For taxable years beginning on or after January 1, 1991, and notwithstanding any other provisions of W. Va. Code § 11-23-5 and this section 5.15 and the subsections thereof of these regulations, financial organizations shall use only the special apportionment rules set forth in W. Va. Code § 11-23-5a and Section 5a and the subsections thereof of these regulations.

§ 110-23-5a Special Apportionment Rules -- Financial Organizations Effective for Taxable Years Beginning on or After January 1, 1991.

5a.1 General. -- The West Virginia Legislature has found that the general formula set forth in W. Va. Code § 11-23-5 for apportioning the tax base of corporations and partnerships taxable in this state as well as in another state is inappropriate for use by financial organizations due to the particular characteristics of those organizations and the manner in which their business is conducted. Accordingly, the general formula set forth in W. Va. Code § 11-23-5 may not be used to apportion the tax base of such financial organizations, and financial organizations are required to use only the apportionment formula and methods set forth in W. Va. Code § 11-23-5a.

5a.2 Financial organizations with business activities partially within and partially without this state. -- A financial organization not having its commercial domicile in West Virginia shall apportion its tax base to this state as provided in W. Va. Code § 11-23-5a and this section 5a of these regulations and the subsections thereof if it regularly engages in business in this state.

5a.2.1 Nexus presumptions and exclusions. -- A financial organization is presumed to be regularly engaging in business in this state if during any year it obtains or solicits business with twenty or more persons within this state, or if the sum of the value of its gross receipts attributable to sources in this state equals or exceeds one hundred thousand dollars. However, gross receipts from the following types of property (as well as those contacts with this state reasonably and exclusively required to evaluate and complete the acquisition or disposition of the property, the servicing of the property or the income from it, the collection of income from the property, or the acquisition or liquidation of collateral relating to the property) shall not be a factor in determining whether the owner is engaging in business in this state:

5a.2.1.1 An interest in a real estate mortgage investment conduit, a real estate investment trust, or a regulated investment company;

5a.2.1.2 An interest in a loan backed security representing ownership or participation in a pool of promissory notes or certificates of interest that provide for payments in relation to payments or reasonable projections of payments on the notes or certificates;

5a.2.1.3 An interest in a loan or other asset from which the interest is attributed to a consumer loan, a commercial loan or a secured commercial loan, and in which the payment obligations were solicited and entered into by a person that is independent, and not acting on behalf, of the owner;

5a.2.1.4 An interest in the right to service or collect income from a loan or other asset from which interest on the loan is attributed as a loan described in Section 5a.2.1.3 of these regulations, and in which the payment obligations were solicited and entered into by a person that is independent, and not acting on behalf of the owner; and

5a.2.1.5 Any amounts held in an escrow or trust account with respect to property described above.

5a.2.2 Definitions. -- For purposes of this section 5a.2 and the subsections thereof of these regulations:

5a.2.2.1 "Deposit" means:

5a.2.2.1.1 The unpaid balance of money or its equivalent received or held by a financial organization in the usual course of business and for which it has given or its is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time or thrift account whether or not advance notice is required to withdraw the credit funds, or which is evidenced by a certificate of deposit, thrift certificate, investment certificate, or certificate of indebtedness, or other similar name, or a check of draft drawn against a deposit account and certified by the financial organization, or a letter of credit or a traveler's check on which the financial organization is primarily liable: Provided, That without limiting the generality of the term "money or its equivalent", any such account or instrument must be regarded as evidencing the receipt of the equivalent of money when credited or issued in exchange for checks or drafts or for a promissory note upon which the person obtaining any such credit or instrument is primarily or secondarily liable or for a charge against a deposit account or in settlement of checks, drafts or other instruments forwarded to such bank for collection;

5a.2.2.1.2 Trust funds received or held by such financial organization, whether held in the trust department or held or deposited in any other department of such financial organization;

5a.2.2.1.3 Money received or held by a financial organization or the credit given for money or its equivalent received or held by a financial organization in the usual course of business for a special or specific purpose, regardless of the legal relationship thereby established, including, without being limited to, escrow funds, funds held as security for an obligation due the financial organization or other (including funds held as dealers reserves) or for securities loaned by the financial organization, funds deposited by a debtor to meet maturing obligations, funds deposited as advance payment on subscriptions to United States Government securities, funds held for distribution or purchase of securities, funds held to meet its acceptances or letters of credit, and withheld taxes: Provided, That there shall not be included funds which are received by the financial organization for immediate application to the reduction of an indebtedness to the receiving financial organization, or under condition that the receipt thereof immediately reduces or extinguishes such an indebtedness;

5a.2.2.1.4 Outstanding drafts (including advice or authorization to charge a financial organization's balance in another such organization), cashier's checks, money orders, or other officer's checks issued in the usual course of business for any purpose, but not including those issued in payment for services, dividends or purchases or other costs or expenses of the financial organization itself; and

5a.2.2.1.5 Money or its equivalent held as a credit balance by a financial organization on behalf of its customer if such entity is engaged in soliciting and holding such balances in the regular course of its business.

5a.2.2.2 "Sales" means: For purposes of apportionment, the "sales" of a financial organization shall mean the gross receipts described in the gross receipts factor in this section 5a and the subsections thereof of these regulations, regardless of their source.

5a.2.3 Commercial domicile - apportionment or credit. -- Financial organizations which do not have their commercial domicile in West Virginia shall use the apportionment rules set forth in W. Va. Code 11-23-5a and this section 5a of these regulations. Financial organizations with their commercial domicile in West Virginia may not apportion their tax base, but shall allocate all capital to West Virginia without apportionment: Provided, That any financial organizations with their commercial domicile in West Virginia shall be allowed the credit against their business franchise tax liability set forth in W. Va. Code § 11-23-27.

5a.2.4 Apportionment rules. --

5a.2.4.1 General Method. -- If a financial organization not having its commercial domicile in this state is engaging in business both within and without this state, the portion of its capital attributable to such business, which is derived from sources within this state, shall be determined by apportionment in accordance with W. Va. Code § 11-23-5a(b) and this section 5a.2.4.1 of these regulations. The apportioned capital shall be determined by multiplying capital by the special gross receipts factor as defined in section 5a.2.4.2 and the subsections thereof of these regulations. Neither the numerator nor the denominator of the gross receipts factor shall include receipts from obligations described in W. Va. Code § 11-24-6(f)(1)(A),(B),(C) and (D).

5a.2.4.2 Special gross receipts factor. -- The gross receipts factor is a fraction, the numerator of which is the total gross receipts of the taxpayer from sources within this state during the taxable year and the denominator of which is the total gross receipts of the taxpayer wherever earned during the taxable year.

5a.2.4.2.1 Numerator. -- The numerator of the gross receipts factor shall include, in addition to items otherwise includable in the sales factor under W. Va. Code § 11-23-5, the following:

5a.2.4.2.1.1 Gross receipts from the lease or rental of real or tangible personal property (whether as the economic equivalent of an extension of credit or otherwise) if the property is located in this state;

5a.2.4.2.1.2 Interest income and other receipts from assets in the nature of loans which are secured primarily by real estate or tangible personal property if such security property is located in this state. In the event that such security property is also located in one or more other states, such receipts shall be presumed to be from sources within this state, subject to rebuttal based upon factors described in rules to be promulgated by the Tax Commissioner, including the factor that the proceeds of any such loans were applied and used by the borrower entirely outside of this state;

5a.2.4.2.1.3 Interest income and other receipts from consumer loans which are unsecured or are secured by intangible property that are made to residents of this state, whether at a place of business, by traveling loan officer, by mail, by telephone or other electronic means or otherwise;

5a.2.4.2.1.4 Interest income and other receipts from commercial loans and installment obligations which are unsecured or are secured by intangible property if and to the extent that the borrower or debtor is a resident of or is domiciled in this state: Provided, That such receipts are presumed to be from sources in this state and such presumption may be overcome by reference to factors described in rules to be promulgated by the Tax Commissioner, including the factor that the proceeds of any such loans were applied and used by the borrower entirely outside of this state;

5a.2.4.2.1.5 Interest income and other receipts from a financial organization's syndication and participation loans, under the rules set forth in sections 5a.2.4.2.1.1 through 5a.2.4.2.1.4 above;

5a.2.4.2.1.6 Interest income and other receipts, including service charges, from financial institution credit card and travel and entertainment credit card receivables and credit card holders' fees if the borrower or debtor is a resident of this state or if the billings for any such receipts are regularly sent to an address in this state;

5a.2.4.2.1.7 Merchant discount income derived from financial institution credit card holder transactions with a merchant located in this state. In the case of merchants located within and without this state, only receipts from merchant discounts attributable to sales made from locations within this state shall be attributed to this state. It shall be presumed, subject to rebuttal, that the location of a merchant is the address shown on the invoice submitted by the merchant to the taxpayer;

5a.2.4.2.1.8 Gross receipts from the performance of services which are attributed to this state if:

5a.2.4.2.1.8.1 The service receipts are loan-related fees, including loan servicing fees, and the borrower resides in this state; except that, at the taxpayer's election, receipts from loan-related fees which are either: (a) "Pooled" or aggregated for collective financial accounting treatment; or (b) manually written as non-recurring extraordinary charges to be processed directly to the general ledger may either be attributed to a state based upon the borrower's residences or upon the ratio that total interest sources to that state bears to total interest from all sources;

5a.2.4.2.1.8.2 The service receipts are deposit-related fees and the depositor resides in this state, except that, at the taxpayer's election, receipts from deposit related fees which are either: (a) "Pooled" or aggregated for collective financial accounting treatment; or (b) manually written as non-recurring extraordinary charges to be processed directly to the general ledger may either be attributed to a state based upon the depositors' residences or upon the ratio that total deposits sources to that state bear to total deposits from all source;

5a.2.4.2.1.8.3 The service receipt is a brokerage fee and the account holder is a resident of this state;

5a.2.4.2.1.8.4 The service receipts are fees related to estate or trust services and the estate's decedent was a resident of this state immediately before death; or the grantor who either funded or established the trust is a resident of this state; or

5a.2.4.2.1.8.5 The service receipt is associated with the performance of any other service not identified above and the service is performed for an individual resident of, or for a corporation or other business domiciled in, this state and the economic benefit of such service is received in this state;

5a.2.4.2.1.9 Gross receipts from the issuance of travelers checks and money orders if such checks and money orders are purchased in this state; and

5a.2.4.2.1.10 All other receipts not attributed by this rule to a state in which the taxpayer is taxable shall be attributed pursuant to the laws of the state of the taxpayer's commercial domicile.

5a.2.4.2.2 Denominator. -- The denominator of the receipts factor shall include all of the taxpayer's receipts from transactions of the kind included in the numerator, but without regard to their source or situs.

5a.3 Method of filing. -- Financial organizations subject to apportionment under section 5a.2 and the subsections thereof of these regulations shall file only separate tax returns, and may not file on a consolidated or any other basis: Provided, That financial organizations which are members of an affiliated group may file on a consolidated basis if all members of the affiliated group have their commercial domicile in this state.

5a.4 Effective date. -- The provisions of this section 5a and the subsections thereof of these regulations shall apply to all taxable years beginning on or after the first day of January, one thousand nine hundred ninety-one.

§ 110-23-6. Imposition Of Tax.

6.1 General. - An annual business franchise tax is imposed under Section 11-23-6 of the West Virginia Code on the privilege of doing business in the State of West Virginia and in respect of the benefits and protections conferred.

Such tax is collected from every domestic corporation, every corporation having its commercial domicile in the State of West Virginia, every foreign or domestic corporation leasing property located in the State of West Virginia or doing business in the State of West Virginia, and from every partnership owning or leasing property located in the State of West Virginia or doing business in the State of West Virginia. The tax is effective beginning July 1, 1987 for taxable years ending after that date.

6.2 Amount of tax and rate: July 1, 1987 to December 31, 1988. - On and after the first day of July, 1987, the amount of tax imposed under Section 11-23-6 and generally under Section 11-23-1 et seq. of the West Virginia Code shall be the greater of fifty dollars ($50.00) or .55% of the value of the tax base, as determined under Section 11-23-1 et seq. of the West Virginia Code and these regulations: Provided, That when the taxpayer's first taxable year under the said Section 11-23-1 et seq. of the West Virginia Code is a short taxable year, the taxpayer's liability shall be prorated based upon the ratio which is the number of months which the said short taxable year bears to twelve (12).

6.2.1 Example: If a taxpayer has a fiscal year ending on September 30, the 1987 short taxable year for that taxpayer will be three (3) months long and will constitute the period of July 1, 1987, to September 30, 1987. The taxpayer would be liable for a tax equal to the greater of $50 X 3/12ths, or the annual tax liability times 3/12ths.

6.3 Taxable years after December 31, 1988. - For taxable years beginning on or after the first (1st) day of January, 1989, the amount of tax due under the Business Franchise Tax Act and these regulations shall be the greater of fifty dollars ($50) or .75% of the value of the tax base as determined under the West Virginia Business Franchise Tax Act and these regulations. When the taxpayer's taxable year for federal income tax purposes is a short taxable year, the tax determined by application of the tax rate to the taxpayer's tax base shall be prorated based upon the ratio which the number of months in such short taxable year bears to twelve (12). However, when the taxpayer's first taxable year under the West Virginia Business Franchise Tax Act and these regulations is less than twelve (12) months, the taxpayer's liability shall be prorated based upon the ratio which the number of months the taxpayer was doing business in this State bears to twelve (12). In no event shall the tax due be less than fifty dollars ($50).

§ 110-23-7. Persons And Organizations Exempt From Tax. - The following organizations and persons shall be exempt from the business franchise tax to the extent provided in Section 11-23-7 of the West Virginia Code and in this Section of these regulations:

7.1 Natural persons doing business in the State of West Virginia that are not doing business in the form of a partnership (as defined in Section 110-23-3 of these regulations). Such persons include persons doing business as sole proprietors, sole practitioners and other self-employed persons.

7.2 Corporations and organizations which by reason of their purposes or activities are exempt from federal income tax: Provided, That this exemption shall not apply to that portion of their capital (as defined in Section 110-23-3 of these regulations) which is used, directly or indirectly in the generation of unrelated business income.

7.2.1 For purposes of this regulation, "unrelated business income" means the gross income derived by any tax exempt corporation or organization from any unrelated trate or business (as defined in I.R.C. § 513) regularly carried on by it which constitutes gross income for purposes of I.R.C. § 512.

7.2.2 For purposes of this regulation, the determination of the portion of capital which is used directly or indirectly in the generation of unrelated business income shall be made by multiplying capital (as defined in Section 110-23-3 of these regulations) of the corporation or organization by a fraction, the numerator of which is the total gross unrelated business income of the corporation or organization, and the denominator of which is the gross income of the corporation or organization from all of its activity.

7.2.3 Capital used directly or indirectly in the generation of unrelated business income shall be adjusted as provided in Section 3.4 of these regulations and apportioned as provided in Section 110-23-5 of these regulations when the corporation or organization is also taxable in another state.

7.3 Insurance companies which pay the State of West Virginia a tax upon premiums.

7.4 Production credit associations organized under the provisions of the federal "Farm Credit Act of 1933": Provided, That this exemption shall not apply to corporations or associations organized under the provisions of Section 19-4-1 of the West Virginia Code.

7.5 Any trust established pursuant to Section 186, Chapter 7, Title 29 of the Code of the Laws of the United States (enacted as Section 302(c) of the Labor Management Relations Act of 1947), as amended prior to the first day of January, 1985.

7.6 Any credit union organized under the provisions of Chapter 31 or any other Chapter of the West Virginia Code provided that this exemption shall not apply to corporations or cooperative associations organized under the provisions of Section 19-4-1 et seq. of the West Virginia Code.

7.7 Any corporation organized under the West Virginia Code which is a political subdivision of the State of West Virginia, or is an instrumentality of a political subdivision of the State of West Virginia, and was created pursuant to the West Virginia Code.

7.8 Farm corporations and partnerships.

7.9 A racing association exempt from payment of the franchise tax in accordance with Section 19-23-12 of the West Virginia Code.

§ 110-23-8. Accounting Periods And Methods Of Accounting.

8.1 General rule. - For purposes of the business franchise tax, a taxpayer's taxable year shall be the same as the taxpayer's taxable year or reporting year for federal income tax purposes.

8.2 Change of taxable year. - If a taxpayer's taxable year or reporting year is changed for federal income tax purposes, the taxpayer's taxable year for purposes of the business franchise tax shall be likewise changed. The taxpayer shall provide a copy of the authorization for such change from the Internal Revenue Service with its business franchise tax return filed for the taxable year under Section 11-23-1 *et seq*. of the West Virginia Code.

8.3 Methods of accounting.

8.3.1 Same as federal. - A taxpayer's method of accounting under the Business Franchise Tax Act shall be the same as the taxpayer's method of accounting for federal income tax purposes. In the absence of any method of accounting for federal income tax purposes, the accrual method of accounting shall be used unless the Tax Commissioner consents, in writing, to the use of another method.

8.3.2 Change of accounting methods. - If a taxpayer's method of accounting is changed for federal income tax purposes, its method of accounting for purposes of the business franchise tax shall likewise be changed. The taxpayer shall provide a copy of the authorization for such change from the Internal Revenue Service with its return filed for the taxable year under the Business Franchise Tax Act.

§ 110-23-9. Annual Returns.

9.1 In general. - Every person subject to the Business Franchise Tax Act shall make and file an annual return for the taxable year with the Tax Commissioner on or before:

9.1.1 The fifteenth (15th) day of the third (3rd) month of the next succeeding taxable year if the person is a corporation; or

9.1.2 The fifteenth (15th) day of the fourth (4th) month of the next succeeding taxable year if the person is a partnership.

9.1.3 The annual return shall include such information as the Tax Commissioner may require for determining the amount of business franchise taxes due for the taxable year.

9.2 Consolidated returns. - Any corporation that files as a part of an affiliated group for purposes of the West Virginia Corporation Net Income Tax Act, shall file a consolidated return under the Business Franchise Tax Act.

9.3 The Tax Commissioner may, at his discretion, require an affiliated group of corporations to file a consolidated business franchise tax return in order to accurately determine the amount of business franchise tax due for the taxable year.

§ 110-23-10. **Extension Of Time For Filing Returns**. - The Tax Commissioner may grant a reasonable extension of time for filing any returns or other documents required under the Business Franchise Tax Act upon such terms as the Tax Commissioner prescribes in these regulations. An extension of time for filing "Federal Form 1120," Federal Form 990T or Federal Form 1065 shall automatically extend the time for filing any return or other document required by the Business Franchise Tax Act for the same period as the extension for filing such federal form. An extension of time for filing a return shall not extend the time for payment of the tax.

10.1 Documents and payment to be submitted for granting of an extension of time for filing returns. - Taxpayers seeking an extension of time for filing a return under this Section shall pay the total amount of tax estimated to be due at the time of filing the request for such extension, unless an extension of time for paying tax has been requested and not denied, or has been granted, and shall at the time of filing the request for such extension file a copy of the taxpayer's request for an extension of time for filing "Federal Form 1120," Federal Form 990T or Federal Form 1065. Failure to file the aforesaid documents in a proper and timely manner or, if an extension of time for paying tax has not been requested or has been denied, failure to pay the total estimated tax due at the time of the submission of a request for an extension of time for filing a return under this Section shall result in the denial of an extension of time to file the West Virginia Business Franchise Tax return.

§ 110-23-11. **Time And Place For Paying Tax Shown On Returns**.

11.1 In general. - The person required to make the annual return required by the Business Franchise Tax Act, shall, without assessment or notice and demand from the Tax Commissioner, pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

11.2 Date fixed for payment of tax. - The date fixed for payment of the business franchise tax shall be deemed to be a reference to the last day fixed for such payment (determined without regard to any extension of time for paying the tax).

11.3 Liability of Successor. - If any person sells out his or its business or stock of goods, or ceases doing business in this state, any tax, additions to tax, penalties and interest shall become due and payable immediately and such person shall, within thirty days after selling out his or its business or stock of goods or ceasing to do business, make a final return or returns and pay any tax or taxes which may be due. The unpaid amount of any such tax shall be a lien upon the property of such person. The successor in business of any person who sells out a business or stock of goods, or ceases doing business, shall be personally liable for the payment of tax, additions to tax, penalties and interest unpaid after expiration of the thirty (30) day period allowed for payment by the predecessor.

11.3.1 The term "successor" means any person who directly or indirectly purchases, acquires, or succeeds to the business or the stock of goods of any person quitting, selling, or otherwise disposing of a business or stock of goods. The purchase or acquisition of a business may give rise to successor liability whether the consideration is money, property, assumption of liabilities or cancellation of indebtedness.

11.3.2 The liability of a successor arises from any sale, transfer, assignment or other acquisition of a business or stock of goods. A person who purchases or acquires a portion of a business or stock of goods may become liable as a successor where he purchases or acquires substantially all of the business assets or stock of goods of such business. If two or more persons purchase or acquire a business or stock of goods, their liability as successor is in proportion to the value of the business assets or stock of goods acquired by each person.

11.3.3 The business assets include all assets of a business pertaining directly to the conduct of the business. Business assets include real property or any interest therein; tangible personal property, including fixtures, equipment, machinery, furniture and vehicles; and intangible property, including accounts receivable, contracts, business name, business goodwill, customer lists, delivery routes, patents, trademarks or copyrights. Any asset owned by a corporation is a business asset. "Stock of goods" means the inventory or merchandise that the taxpayer is in the business of selling, but does not include fixtures, equipment, machinery or vehicles used in connection with such business.

11.3.4 If any taxpayer operates more than one business, each at separate locations, and each location being required to have a separate business registration certificate, each business location is a separate business and has a separate stock of goods and separate business assets for purposes of determining successor liability. The cessation of business at any one location, or the sale of the business assets or stock of goods of any one location, may result in successor liability. A successor in business of any business location is subject to liability as a successor with respect to the tax attributable to the location, even if he does not purchase the business or stock of goods of all the locations based on the proportion of total West Virginia assets of the predecessor represented by assets at the location taken over by the successor from the predecessor.

11.3.5 The change in the form of a business will generally give rise to successor liability. A change in the form of a business would include changes such as the incorporation of a partnership, the voluntary or involuntary dissolution of a corporation, the merger or consolidation of two or more corporations or the formation of a partnership from one or more partnerships or corporations.

11.3.6 Successor liability does not arise in connection with sales or transfers pursuant to: assignments for the benefits of creditors, deeds of trust, security interests, conditional sales, statutory liens, or judgment liens; or sales or transfers by personal representatives, executors, administrators, receivers, trustees, or any public officer, unless the previous owner receives purchase money from the transfer or sale. Any business operated under Title 11 of the United States Code, which is purchased or acquired by another person, shall not give rise to successor liability.

11.3.6.1 If a business or stock of goods is voluntarily sold or transferred to a creditor, and the creditor operates the business, the creditor is a successor. If the creditor does not operate the business or operates the business in liquidation with the sole purpose to recover its debt, the creditor is not a successor.

11.3.7 The purchaser of the business or stock of goods in an arm-s length transaction will be released from liability if he withholds from the purchase price an amount sufficient to cover the tax liability of the seller or former owner, and pays such liability in full, including all applicable penalties, additions to tax and interest or if the seller obtains a certificate from the Tax Department stating that no taxes are due from the seller or former owner. Disclosure of such information to the successor shall constitute disclosure of tax return information to a person having a material interest pursuant to W. Va. Code § 11-10-5d(f) and these regulations, and such disclosure shall be made or withheld at the discretion of the Tax Commissioner. Purchase price is not limited to cash transferred to the seller, but includes any consideration flowing directly or indirectly to a seller.

11.3.7.1 The requirement to withhold does not necessarily mean to retain or hold physical assets, but means dealing with the purchase consideration in such a manner as to deny the seller the benefit of the purchase consideration and to make it available to the State for the satisfaction of the tax liability.

11.3.8 The liability of a successor extends to taxes incurred in the course of operation of the business by the former owner and any successor liability of the former owner. The liability may include any liability of the former owner for tax, interest, additions to tax, and penalties that is due and payable, and any such liability that is not due and payable because the former owner has not filed tax returns at the time required by law. The liability includes all taxes, penalties, interest, and additions to tax, whether assessed or unassessed against the former owner, without regard to whether a tax lien has been issued or perfected against the former owner. If any former owner is given a certificate from the Tax Department stating that no taxes are due from his former owner, then the successor shall only be liable for the tax liability of his former owner not covered by the said certificate.

11.3.8.1 The liability of a successor includes taxes that are required by law to be paid prior to the sale or transfer of the business or stock of goods, even if the liability of the former owner is not determined at the time of the sale or transfer. However, if an audit conducted after the sale or transfer shows a deficiency for periods prior to the sale or transfer, the deficiency is a liability of the former owner and a liability of the successor.

11.3.9 The liability of a successor in business is not limited to the amount of purchase money, or consideration received by the former owner, unless the successor avoids liability or limits liability by one or more of the following methods. If th purchase of a business or stock of goods is an arms-length transaction, the purchaser may avoid any successor liability by requiring the seller to produce a receipt from the Tax Commissioner showing all taxes of the seller have been paid. If the purchase of a business is an arms-length transaction, the purchaser may limit successor liability by withholding enough of the purchase money to satisfy the tax liability of the seller. If the purchase or transfer of a business or stock of goods is not an arms-length transaction, the purchaser or transferee may avoid any successor liability by requiring the seller or transferor to produce a receipt from the Tax Commissioner showing all taxes of the seller or transferor have been paid.

11.3.10 The liability of a successor is determined by law and cannot be avoided or altered by contracts or agreements between the former owner and successor. Thus, a contract or other agreement, providing that the purchaser, transferee, seller, or transferor is or is not responsible for the tax liability of the former owner, or that the former owner has no tax liability, does not alter the liability of the successor.

11.3.11 The liability of a successor may be determined or estimated and an assessment made against such successor. An assessment against a successor is considered to be a proceeding for the collection of the tax liability of the former owner. If the liability of the former owner is determined to be due by an assessment which has become final, an assessment against a successor must be made within five years after the date on which the former owner filed its annual return, or if no annual return is required, five years after the latest periodical return required to be filed in any year is filed.

§ 110-23-11a. Priority of Tax in Distributions of Property and Estates.

11a.1 In the distribution, voluntary or compulsory, in receivership, bankruptcy or otherwise, of the property or estate of any person, all taxes due and unpaid under W. Va. Code § 11-23-1 et. seq. shall be paid from the first money available for distribution in priority to all claims and liens except taxes and debts due the United States which under federal law are given priority over the debts and liens created by this article. Any person charged with the administration or distribution of any such property or estate who shall violate the provisions of this section shall be personally liable for any taxes accrued and unpaid under this article which are chargeable against the person whose property or estate is in administration or distribution.

11a.2 There is a priority for all unpaid business franchise tax in distributions of the property or estate of any person, and the tax must be paid from the first money available for distribution in priority to all other claims an liens, except taxes and debts due the United States.

11a.2.1 The distribution of property subject to federal tax liens is subject to the priority of such liens provided in the Internal Revenue Code.

11a.2.2 The distribution of property in federal bankruptcy proceedings is subject to the priorities of debts and liens provided in the United States Bankruptcy Code (11 U.S.C. § 101 et seq..

11a.2.3 This priority applies to the amount of tax, interest, additions to tax, and penalties.

11a.3 The priority applies to all distributions of the property or estate of any person. A "distribution" of property or an estate is the sale or transfer of the property, or the disbursement of money resulting from the sale or transfer of the property or estate of any person. The priority applies to all distributions of a major part or substantial part of the property or estate of any person. Distributions include, but are not limited to, the transfer of property or disbursement of proceeds of sales of property by any executor, administrator, receiver, trustee, fiduciary, special commissioner, or any public officer under judicial process; and distributions in any proceedings such as bulk sale, liquidation sale, estate sale, assignment for the benefit of creditors, intepleader action, and administrative or judicial proceeding for the dissolution of a partnership or corporation.

11a.4 The priority does not apply to transactions that do not constitute distributions of property. These transactions include the sale, transfer or liquidation of less than a substantial part of the property of any person; the sale or transfer of property in the ordinary course of the business of the owner of the property; sales or transfers of any property by the owner or for consideration payable to the owner by the purchaser or transferee.

11a.5 This priority applies to the distribution of all property, including but not limited to real property or any interest therein; tangible personal property, including fixtures, equipment, machinery, furniture and vehicles; intangible property, including accounts receivable, contract rights, bank accounts, stocks, bonds; and the proceeds from the sale or liquidation of any such property.

11a.6 This priority requires payment of the tax from the first money that is available for distribution to lienors, creditors, beneficiaries, or any other person, after payment of costs, commissions, fees and any other expenses incurred in the preservation, storage, liquidation, or transportation of the property or estate.

11a.7 The debt or claim for taxes has priority over all claims and liens, except debts due the United States.

11a.7.1 Claims subject to this priority include any debt or obligation, liquidated or unliquidated, that does not constitute a lien upon the property or estate.

11a.7.2 Liens subject to this priority include any charge or encumbrance on the property or estate for payment of any claim, debt or obligation, such as a deed of trust, judgment lien, security interest, vendors lien, execution lien, tax lien, mechanics lien, landlords lien and municipal lien.

11a.7.3 The priority of the business franchise tax debt in such distributions is not determined by the presence or absence of a perfected notice of tax lien, by the presence or absence of a perfected lien securing an competing claim or debt, or by the order in which any such competing liens were perfected.

§ 110-23-12. Extensions Of Time For Paying Tax.

12.1 Amount determined on return. - The Tax Commissioner may extend the time for payment of the amount of the tax shown, or required to be shown, on any return required by the Business Franchise Tax Act (or any periodic installment payments), for a reasonable period not to exceed six (6) months from the date fixed for payment thereof.

12.2 Amount determined as deficiency. - In accordance with Section 11-23-12 of the West Virginia Code and under these regulations, the Tax Commissioner may extend the time for the payment of the amount determined as a deficiency of the tax imposed by Section 11-23-1 of the West Virginia Code for a period not to exceed eighteen (18) months from the date fixed for payment of the deficiency. In exceptional cases, a further period of time not to exceed twelve (12) months may be granted. An extension of time under Section 11-23-12(b) of the West Virginia Code and this Section of these regulations may be granted only where it is shown to the satisfaction of the Tax Commissioner that payment of a deficiency upon the date fixed for the payment thereof will result in undue hardship to the taxpayer.

12.3 No extension for certain deficiencies. - No extension shall be granted under Section 11-23-12 of the West Virginia Code or this Section of these regulations for any deficiency of tax, interest, penalties or other charges if such deficiency is due to negligence, intentional disregard of rules and regulations, or to fraud with intent to evade tax.

12.4 Documents to be submitted for granting an extension of time for paying the tax and procedure for applying for an extension of time for paying tax. - Taxpayers seeking an extension of time for paying tax under these regulations shall file a written request with the Tax Commissioner for such an extension on or before the time fixed by statute for payment of the tax. Such request shall set forth the relevant facts and the reason for the taxpayer's inability to make payment of the tax due on its tax return.

12.4.1 The taxpayer shall file its tax return or, in the case of a request for extension of time for paying tax made in conjunction with a request for extension of time for filing a return under Section 110-23-10 of these regulations, a copy of such request for extension of the time to file the return, with the request for an extension of time for paying the tax.

12.5 An extension of time for paying the tax shall not constitute an extension of time for filing any tax return.

12.6 No extension of time shall be granted unless the Tax Commissioner finds that exceptional circumstances exist and that to require payment within the time prescribed by the statute would work an undue hardship on the taxpayer.

12.7 If the time for payment of tax is extended, interest at the rate established under Section 11-10-17a of the West Virginia Code and accruing from the original due date of the return, until the tax and all interest, penalties and additions relating to such tax are paid shall be added to such tax.

12.8 Furnishing of security. - As a prerequisite to granting an extension of time for payment of any tax or deficiency, the Tax Commissioner may require the taxpayer to furnish a bond or other security. Such bond or other security shall be in an amount not exceeding the amount for which the extension of time for payment is granted.

§ 110-23-13. Declaration And Payment Of Estimated Tax.

13.1 Requirement of declaration. - Every taxpayer subject to the business franchise tax under Section 11-23-1 *et seq*. of the West Virginia Code shall file a declaration of estimated tax for the taxable year if the taxpayer's liability for tax under Section 11-23-1 *et seq*. of the West Virginia Code can reasonably be expected to exceed twelve thousand dollars ($12,000.00) for the taxable year. A taxpayer not required by Section 11-23-13 of the West Virginia Code or this Section of these regulations to file a declaration and pay estimated tax may elect to so file and pay.

13.2 Definition of estimated tax. - The term "estimated tax" means the amount which a taxpayer estimates to be its liability under Section 11-23-1 *et seq*. of the West Virginia Code for the taxable year.

13.3 Contents of declaration. - The declaration shall contain such information as the Tax Commissioner may prescribe by the instructions for the declaration of estimated tax form or by the form itself.

13.4 Time for filing declaration. - A declaration of estimated tax shall be filed on or before the fifteenth (15th) day of the fourth (4th) month of the taxable year, for any taxable year beginning after the thirtieth (30th) day of June, 1987.

13.4.1 Time for filing declaration for the period of July 1, 1987 to the end of the taxpayer's taxable year. - A declaration of estimated tax shall be filed on or before the fifteenth (15th) day of the third (3rd) month of any fiscal or calendar year tax quarter ending after July 1, 1987 for the tax liability accrued on and after July 1, 1987, through the end of any taxable year ending before June 30, 1988, if the taxpayer's liability for tax under Section 11-23-1 *et seq*. of the West Virginia Code, can reasonably be expected to exceed six thousand dollars ($6,000.00) for the period of July 1, 1987 to the end of the taxpayer's taxable year or through December 31, 1987, whichever comes first, based on a monthly pro ration of the estimated annual tax liability.

13.4.2 Payment of estimated tax for the period of July 1, 1987, to the end of the taxpayer's taxable year. - The estimated tax due for the period of July 1, 1987, to the end of the taxable year ending before June 30, 1988, shall be paid in equal installments, the number of which is determined by the number of tax quarters, or partial tax quarters, remaining in the taxable year which end on or after July 1, 1987, but prior to June 30, 1988. The first installment payment shall be made at the time of filing the declaration. Remaining installments, if any, shall be paid on or before the fifteenth (15th) day of the third (3rd) month of each remaining tax quarter of the short taxable year.

13.5 Amendment of declaration. - A taxpayer may amend his declaration at any time during the taxable year in accordance with these regulations. If any amendment of a declaration is filed by a taxpayer, the remaining installments, if any, shall be ratably increased or decreased (as the case may be) to reflect any increase or decrease in the estimated tax by reason of such amendment. If any amendment is made after the fifteenth (15th) day of the ninth (9th) month of the taxable year, any increase in the estimated tax by reason thereof shall be paid at the time of making such amendment.

13.6 Payment of estimated tax. - The estimated tax shall be paid in four equal installments. At the time the declaration of estimated payment is filed, the taxpayer shall pay one-fourth (1/4th) of the estimated tax liability for the taxable year. The second, third and fourth installments shall be paid on the following fifteenth (15th) day of the sixth (6th), ninth (9th) and twelfth (12th) months of the taxable year, respectively.

13.7 Application to a short taxable year. - The provisions of this Section of these regulations shall apply to a taxable year of less than twelve (12) months.

13.7.1 Time for filing declaration for a short taxable year. - A declaration of estimated tax shall be filed on or before the fifteenth (15th) day of the third (3rd) month of the first fiscal or calendar year tax quarter, or the first partial fiscal or calendar year tax quarter, of the short taxable year.

13.7.2 Payment of estimated tax for a short taxable year. - The estimated tax due for a short taxable year shall be paid in equal installments, the number of which is determined by the number of tax quarters, or partial tax quarters, remaining in the short taxable year. The first installment shall be made at the time of filing the declaration. Remaining installments, if any, shall be paid on or before the fifteenth (15th) day of the third (3rd) month of each remaining tax quarter of the short taxable year.

13.8 Installments paid in advance. - Any taxpayer may elect to pay any installment of its estimated tax prior to the date prescribed for such payment.

13.9 Criminal and administrative sanctions. - The provisions of the West Virginia Code regarding failure to properly file declarations of estimated tax or estimated tax returns or other documents or to pay estimated tax or any installment thereof in a proper and timely manner, including, but not limited to, the applicable provisions of Chapter 11, Article 9 of the West Virginia Code, Section 11-10-5L and Section 11-10-18a of the West Virginia Code, as well as any other applicable provisions of Chapter 11, Article 10 of the West Virginia Code, shall apply to the filing of declarations of estimated tax, estimated tax returns and payments of estimated tax under Section 110-23-13 of these regulations.

§ 110-23-14. Requirements Concerning Returns, Notices, Records And Statements.

14.1 General. - The Tax Commissioner may require any person to make such returns, render such statements, or keep such records, as the Tax Commissioner may deem sufficient to show whether or not such person is liable for tax under the Business Franchise Tax Act.

14.2 As a part of a full and complete tax return, the taxpayer shall provide:

14.2.1 A copy of pages one (1) through four (4) of its signed federal corporation income tax return or its signed federal partnership income tax return, as filed with the Internal Revenue Service for the taxable year; and

14.2.2 If a consolidated federal income tax return was filed for the taxable year:

14.2.2.1 Supporting schedules showing the consolidation of its income statement and balance sheet, including schedules supporting any eliminations and adjustments made to the income statement and balance sheet;

14.2.2.2 A copy of Federal Form 851 as filed with the Internal Revenue Service and supporting schedules displaying subsidiary corporations in which the taxpayer has stock ownership; and

14.2.2.3 A signed statement explaining the relationship and differences, if any, between the income statement and the balance sheet reported for federal consolidated filing purposes and the income statement and the balance sheet reported to the State of West Virginia under the tax imposed by Section 11-23-1 et seq. of the West Virginia Code.

14.3 Notice of qualification as a receiver, trustee, assignee or other fiduciary. - Every receiver, trustee in bankruptcy, assignee for benefit of creditors, or other like fiduciary shall give notice of his qualification as such to the Tax Commissioner.

14.4 In circumstances where a remittance (or remittances) of tax accompanying, or relating to a combined tax return for both the business franchise tax and the corporation net income tax is paid to the Tax Department, whether in the form of separate checks for each tax or in the form of a single check or in any other form, the remittance or remittances of tax shall first be applied against the taxpayer's corporation net income tax liability, and only after the corporation net income tax liability has been fully satisfied will the remainder of the said remittance or remittances then be applied against the business franchise tax liability.

§ 110-23-15. Signing Of Returns And Other Documents.

15.1 General. - Any return, statement or other document required to be made or filed under the provisions of the Business Franchise Tax Act or these regulations shall be signed in accordance with the instructions prescribed by the Tax Commissioner and in accordance with these regulations.

15.2 Signing of corporation returns. - The return of a corporation shall be signed by the president, vice president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to so act. In the case of a return made for a corporation by a fiduciary, such fiduciary shall sign the return. The fact that an individual's name is signed on the return shall be prima facie evidence that such individual is authorized to sign the return on behalf of the corporation.

15.3 Signature presumed authentic. - The fact that an individual's name is signed to a return, statement or other document shall be prima facie evidence for all purposes that the return, statement or other document was actually signed by that individual.

15.4 Verification of returns. - Except as otherwise provided by the Tax Commissioner, any return, declaration or other document required to be made under Section 11-23-1 et seq. of the West Virginia Code shall contain or be verified by a written declaration that it is made under the penalties of perjury.

§ 110-23-16. Place For Filing Returns Or Other Documents. - Tax returns, statements or other documents, or copies thereof, required by Section 11-23-1 et seq. of the West Virginia Code or by these regulations shall be filed with the Tax Commissioner by delivering such returns, statements or other documents, or copies thereof, in person or by mail, to the Tax Commissioner's office in Charleston, West Virginia: Provided, That the Tax Commissioner may, by regulation, prescribe the place for filing tax returns, statements or other documents or copies thereof.

§ 110-23-17. Credits Against Tax.

17.1 On and after the first day of July, 1988, a credit shall be allowed against the tax imposed by Section 11-23-1 et seq. of the West Virginia Code equal to the amount of franchise tax liability due under the said Section 11-23-1 et seq. of the West Virginia Code, (determined before application of credits) multiplied by a fraction, the numerator of which is the gross income of the business subject to tax under Article thirteen-a of Chapter eleven of the West Virginia Code and the denominator of which is the total amount of gross receipts derived from or attributable to all of the taxpayer's activity in West Virginia.

17.1.1 Expiration of credit. - The credit authorized in Section 11-23-17(a) of the West Virginia Code and Section 17.1 of these regulations shall expire and not be authorized or allowed for any taxable month beginning on or after March 1, 1989. For taxable years beginning before March 1, 1989 and ending after March 1, 1989, the annual credit heretofore allowed by Section 11-23-17(a) of the West Virginia Code and Section 17.1 of these regulations shall be prorated by the number of months in the taxable year, and only that portion of the credit attributable to months ending prior to March 1, 1989, shall be allowable.

17.2 On and after the first day of July, 1988, a credit shall be allowed against the business franchise tax imposed by Section 11-23-1 et seq. of the West Virginia Code equal to the amount of franchise tax liability due under the said Section 11-23-1 et seq. of the West Virginia Code, (determined before application of credits) multiplied by a fraction, the numerator of which is the gross income of the business subject to tax under Article thirteen thirteen-a of Chapter eleven of the West Virginia Code and the denominator of which is the total amount of gross receipts derived from or attributable to all of the taxpayer's activity in West Virginia.

17.3 Rules.

17.3.1 Gross receipts derived from or attributable to all of the taxpayer's activity in West Virginia. - For purposes of this Section, the term "gross receipts derived from or attributable to all of the taxpayer's activity in West Virginia" shall be the amount received in money, credits, property or other consideration from sales of property in this State (including a lease or license to use property in this State) or services rendered within this State, without deduction on account of the cost of property sold or amounts paid for any expenses. Gross receipts shall include the fair market value of natural resource products upon which the tax imposed by Article thirteen-a of Chapter eleven of the West Virginia Code was paid; and the amount of the receipts or value of public services taxed under Section two and two-d or two-m, Article thirteen of Chapter eleven of the West Virginia Code.

17.4 Parent corporations. - A parent corporation taxpayer which files a separate return under the Business Franchise Tax Act shall be allowed a credit against such taxpayer's liability for the tax under the said Business Franchise Tax Act for the amount of net taxes that would have been paid without regard to the adjustment required by Section 11-23-3(b)(2)(E) of the West Virginia Code (formerly Section 11-23-3(b)(2)(D) of the West Virginia Code) or the credit allowed by Section 11-23-17(a) of the West Virginia Code for the taxable year by a subsidiary corporation or partnership: Provided, that the amount of credit allowed shall not exceed the amount of tax that would have been paid, without regard to such adjustment or credit, under the Business Franchise Tax Act by the subsidiary or partnership, multiplied by the percentage of the parent's ownership of the subsidiary corporation or partnership. In the case of corporations, this percentage shall be equal to the percentage of stock of all classes owned by the parent. In no case shall any credit allowable by Section 11-23-17 of the West Virginia Code, which is not used on an annual return, be carried forward or back but instead such credit shall be forfeited.

<u>17.4.1 Subsidiary Credit Available for Corporate Partners. - A corporate partner owning an interest in a partnership, and which corporate partner files a separate return under the Business Franchise Tax Act shall be allowed a credit against such corporate partner taxpayer's liability for the tax under the said Business Franchise Tax Act for the amount of net taxes which would have been paid without regard to the adjustment required by W. Va. Code § 11-23-3(b)(2)(E) (formerly W. Va. Code § 11-23-3(b)(2)(D)) or the credit allowed by W. Va. Code § 11-23-17(a) for the taxable year by the subsidiary partnership: Provided, That the amount of credit allowed shall not exceed the amount of tax that would have been paid without such regard to such adjustment or credit, under the Business Franchise Tax Act by the subsidiary partnership, multiplied by the percentage of the corporate partner's ownership of the subsidiary partnership. In the case of the corporate partner, this percentage shall be equal to the percentage of the capital accounts of the subsidiary partnership owned by the corporate partner. In no case shall any credit allowable by W. Va. Code § 11-23-17, which is not used on the annual return, be carried forward or back but instead such credit shall be forfeited.</u>

<u>17.4.2 Subsidiary Credit Available For Partnerships Owning Interest in Another Partnership. - A partnership which owns an interest in another partnership and which parent partnership files a separate return under the Business Franchise Tax Act shall be allowed a credit against such parent</u>

partnership's liability for the tax under the said Business Franchise Tax Act for the amount of net taxes which would have been paid without regard to the adjustment required by W. Va. Code § 11-23-3(b)(2)(E) (formerly W. Va. Code § 11-23-3(b)(2)(D)) or the credit allowed by W. Va. Code § 11-23-17(a) for the taxable year by a subsidiary partnership; Provided, That the amount of credit allowed shall not exceed the amount of tax that would have been paid, without regard to such adjustment or credit, under the Business Franchise Tax Act by the subsidiary partnership, multiplied by the percentage of the parent partnership's ownership of the subsidiary partnership. This percentage shall be equal to the percentage of the partners' capital accounts owned by the parent partnership. In no case shall any credit allowable by W. Va. Code § 11-23-17 of the West Virginia Code, which is not used on an annual return, be carried forward or back but instead such credit shall be forfeited.

17.4.3 For Purposes of These Regulations, The Term "Parent Partnership" Means a Partnership Which Owns an Interest in Another Partnership and the Term "Subsidiary Partnership" Means That Partnership in Which Such an Interest is Owned by a Partnership or a Corporate Partner. For definition of the term "corporate partner", see section 3.19.2 of these regulations.

17.5 Bank shares tax credit. - A credit is allowed against the business franchise tax liability for property taxes paid to a county, district or town in West Virginia on shares of stock in a banking institution, national banking association, or industrial loan company imposed under Section 11-3-14 of the West Virginia Code. Property taxes imposed under Section 11-3-14(a) of the West Virginia Code and paid to a county, district or town in West Virginia on the capital of a building and loan association or federal savings and loan associations also qualify for the credit.

17.5.1 The amount of the credit is the lesser of the net amount of ad valorem property taxes payable for the time period for which the business franchise tax return is filed, or the business franchise tax liability remaining after application of the subsidiary credit set forth under Section 17.4 of these regulations and the business and occupation tax credit set forth under Section 17.2 of these regulations.

17.5.1.1 The "net amount" of property taxes is the property tax liability minus any discount earned. The net amount of property taxes shall not include any interest or penalties imposed.

17.5.2 To determine the dollar amount of property taxes available for credit consideration, a dollar amount attributable to each month must be established. The sum of the dollar amounts attributable to the months after June 30, 1987, which occur within the filing period, is the amount of ad valorem property taxes available for the credit.

17.5.2.1 Example: A taxpayer, filing a West Virginia business franchise tax return for the taxable year ending December 31, 1987, will have available for credit consideration only fifty percent (50%) of the 1987 property taxes. This amount represents the dollar amount of the property taxes attributable to the months of July through December, 1987.

17.5.3 A fiscal year taxpayer will use only the dollar amounts attributable to the months within the filing period that begin on or after July 1, 1987.

17.5.3.1 Example: A taxpayer whose fiscal year ends September 30, 1987, will have available for credit consideration the dollar amounts attributable to the months of July, August and September, 1987.

17.6 Order in which credits are taken. - The credits set forth in Section 110-23-17 shall be taken in the following order:

17.6.1 First, the credit set forth in Section 17.4 of these regulations, if any.

17.6.2 Second, the credit set forth in Section 17.1 or 17.2 of these regulations, if any.

17.6.3 Third, the credit set forth in Section 17.5 of these regulations, if any.

§ 110-23-17a. Tax Credit For Business Investment And Jobs Expansion; Industrial Expansion And Revitalization; Eligible Research And Development Projects; Coal Loading Facilities And Consumers Sales And Service Tax And Use Tax Paid.

17a.1 There shall be allowed as credit against the tax imposed by the Business Franchise Tax Act for the taxable year the amount determined under Sections 11-13C-1 *et seq.*, 11-13D-1 *et seq.* and 11-13E-1 *et seq.* of the West Virginia Code relating respectively to:

17a.1.1 The tax credit for business investment and jobs expansion;

17a.1.2 The tax credit for industrial expansion and revitalization and eligible research and development projects; and

17a.1.3 The tax credit for coal loading facilities.

17a.2 Reserved for future use.

17a.3 Credit for Consumers Sales and Service Tax and Use Tax Paid. - The tax imposed by Section 11-23-1 of the West Virginia Code shall be subject to the credits allowed for tax exempt purchases or uses which are set forth at Section 11-15-9b and Section 11-15A-3b of the West Virginia Code, in accordance with the said Section 11-15-9b or Section 11-15A-3b.

17a.4 Order in Which Credits are Taken. - The credits set forth in Section 110-23-17a shall be taken after the credits set forth in Section 110-23-17 and shall be taken in the following order:

17a.4.1 First, the credit set forth in Section 17a.1 of these regulations, if any.

17a.4.2 Second, the credit set forth in Section 17a.3 of these regulations, if any.

§ 110-23-18. Tax Under Section 11-23-1 Et Seq. Of The West Virginia Code Is In Addition To All Other Taxes. - The returns, requirements and taxes set forth and imposed under Section 11-23-1 et seq. of the West Virginia Code, the Business Franchise Tax Act, shall be in addition to all other reports, requirements, taxes and duties set forth and imposed by the State of West Virginia.

§ 110-23-19. Records.

19.1 Every taxpayer liable for reporting or paying taxes under the Business Franchise Tax Act shall keep such records, receipts, invoices and other pertinent papers and documents in such form as the Tax Commissioner may require by instruction.

19.2 Every taxpayer shall keep such records for not less than three (3) years after the annual return is filed under Section 11-23-1 et seq. of the West Virginia Code, unless the Tax Commissioner in writing authorizes their earlier destruction. An extension of time for making an assessment or filing a claim for refund shall automatically extend the time period for keeping the records for all years subject to assessment or refund covered in the agreement for extension of time for making an assessment.

§ 110-23-20. Criminal Penalties. - Each and every provision of the West Virginia Tax Crimes and Penalties Act set forth in Section 11-9-1 et seq. of the West Virginia Code shall apply to the business franchise tax imposed under Section 11-23-1 et seq. of the West Virginia Code with like effect as if the said act were applicable only to the tax imposed by the said Section 11-23-1 et seq. of the West Virginia Code and were set forth in extenso in the said Section 11-23-1 et seq. of the West Virginia Code.

§ 110-23-21. General Procedure And Administration. - Each and every provision of the West Virginia Tax Procedure and Administration Act set forth in Section 11-10-1 et seq. of the West Virginia Code, shall apply to the business franchise tax imposed by Section 11-23-1 et seq. of the West Virginia Code with like effect as if the said act were applicable only to the tax imposed by the said Section 11-23-1 et seq. of the West Virginia Code and were set forth in extenso in the said Section 11-23-1 et seq. of the West Virginia Code.

§ 110-23-22. Severability. - If any provision of Section 11-23-1 et seq. of the West Virginia Code or the application thereof shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of the said Section 11-23-1 et seq. of the West Virginia Code, but shall be confined in its operation to the provision thereof directly involved in the controversy in which such judgments shall have been rendered, and the applicability of such provision to other persons or circumstances shall not be affected thereby.

§ 110-23-23. Reserved for Future Use.

§ 110-23-24. Reserved for Future Use.

§ 110-23-25. Credit for consumers sales and service tax and use tax paid. The tax imposed by W. Va. Code article 23, chapter 11, shall be subject to the credit set forth in W. Va. Code § 11-15-9b and the credit set forth in W. Va. Code § 11-15A-3b. See Section 17a.3 of these regulations.

§ 110-23-26. Reserved for Future Use.

§ 110-23-27. Credit for Franchise Tax Paid to Another State by A Financial Organization.

27.1 Effective for taxable years beginning on or after January 1, 1991, and notwithstanding any provisions of the West Virginia Code to the contrary, any financial organization, having its commercial domicile in this state shall be allowed a credit against the tax imposed by W. Va. Code article 23, chapter 11, for any taxable year for taxes paid to another state or political subdivision thereof. That credit shall be equal in amount to the lesser of:

27.1.1 The taxes such financial organization shall actually have paid, which payments were made on or before the filing date of the annual return required by W. Va. Code article 23, chapter 11, to any other state or political subdivision thereof, and which tax was based upon or measured by the financial organization's capital and was paid with respect to the same taxable year; or

27.1.2 The portion of the tax actually paid that the financial organization would have paid if the rate of tax imposed by W. Va. Code article 23, chapter 11, is applied to the tax base determined under the law of such other state or political subdivision.

27.2 Any additional payments of such tax to other states, or to political subdivisions thereof, by a financial organization described in this section, and any refunds of such taxes, made or received by such financial organization with respect to the taxable year, but after the due date of the annual return required by W. Va. Code article 23, chapter 11, for the taxable year, including any extensions, shall likewise be accounted for in the taxable year in which such additional payment is made or such refund is received by the financial organization.

§ 110-23-28. Notice of Business Activities Report.

28.1 Except as provided by section 28.2 of these regulations, for each taxable year every corporation and partnership that carries on any business activity or owns or maintains property in West Virginia for the taxable year shall file a business activity report with the Tax Commissioner. The report must be filed on or before the fifteenth day of the fourth month after the end of the corporation or partnership's taxable year. The filing of a report shall not be a factor in determining whether a corporation or partnership is subject to taxation by this state.

28.2 A corporation or partnership is not required to file a report under this section 28 and the subsections thereof of these regulations if:

28.2.1 During the taxable year for which a report is due, the corporation or partnership is registered to engage in business in West Virginia in accordance with the provisions of W. Va. Code article 12, chapter 11;

28.2.2 A tax return was filed for that taxable year for any of the taxes subject to the provisions of W. Va. Code article 10, chapter 11;

28.2.3 The corporation or partnership is a type of organization expressly exempted from taxation by West Virginia or federal statute or regulation; or

28.2.4 The activities or interests in property owned in this state by the corporation or partnership consist solely of activities or property expressly exempted from taxation by West Virginia or federal statute or regulation.

28.3 Until a report is filed in compliance with this section 28 and the subsections thereof of these regulations, a corporation or partnership may not pursue in the courts of this state any claim not relating to tax liability:

28.3.1 That arose under West Virginia law; or

28.3.2 On a contract that is executed under West Virginia law, if the claim arose or the contract was executed before or during the taxable year for which a report should have been filed. However, the court in which such a claim is filed may allow the claim to be pursued if the corporation or partnership:

28.3.2.1 Establishes that it was not required to file a report under section 28.2 and the subsections thereof of these regulations;

28.3.2.2 Files a report for each year for which a report is due;

28.3.2.3 Files a tax return for each year for which a return is due; or

28.3.2.4 Provides adequate security, including a bond, in an amount sufficient to cover all tax liabilities, including additions to tax, penalties and interest for each year for which tax is due subject to the provisions of W. Va. Code article 10, chapter 11.

28.4 As used in this section 28 and the subsections thereof of these regulations, carrying on an activity or maintaining property in West Virginia includes, but is not limited to, any of the following:

28.4.1 Maintaining an office or other place of business in West Virginia;

28.4.2 The presence of employees, agents, representatives or independent contractors in West Virginia, if they are conducting business on behalf of the corporation or partnership, regardless of whether the individual or person is residing or regularly stationed in West Virginia;

28.4.3 Owning or maintaining real property, tangible personal property, or intangible property that is in West Virginia; or

<u>28.4.4 Any activity of a financial organization described in W. Va. Code § 11-23-5a(b)(4)(B)(i) through (x) inclusive.</u>