WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION

Form #3

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NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: WV State Tax Department TITLE NUMBER: 110

CITE AUTHORITY: Legislative

AMENDMENT TO AN EXISTING RULE: YES ____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ____

TITLE OF RULE BEING AMENDED: ____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 28

TITLE OF RULE BEING PROPOSED: MUNICIPAL SALES AND SERVICE AND USE TAX ADMINISTRATION

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Authorized Signature

QUESTIONNAIRE

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

DATE: July 26, 2013

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) State Tax Department, Legal Division, 1001 Lee Street, East, Charleston, WV 25324-1005 (304) 558-5330

LEGISLATIVE RULE TITLE: Municipal Sales and Service and Use Tax Administration

1. Authorizing statute(s) citation West Virginia Code §11-10-11c

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

   June 25, 2013

   b. What other notice, including advertising, did you give of the hearing?

   None

   c. Date of Public Hearing(s) or Public Comment Period ended:

   June 25, 2013

   d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

   Attached Comments from: City of Charleston, Monongalia County Commission, Municipal League

   e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)
   July 26, 2013

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

   Mark S. Morton, General Counsel for Revenue Operations

State Tax Department - Legal Division, P.O. Box 1005, Charleston, WV

304-558-5330 (tel) 304-558-8728 (fax)

Mark.S.Morton@wv.gov

g. **IF DIFFERENT FROM ITEM 'f',** please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

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

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

N/A

b. Date of hearing or comment period:

N/A

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

PROPOSED
TITLE 110
LEGISLATIVE RULE
TAX DEPARTMENT
SERIES 28
MUNICIPAL SALES AND SERVICE AND USE TAX ADMINISTRATION
STATEMENT OF CIRCUMSTANCES

The passage of H.B. 105 in the First Special Session of the Legislature in 2013 authorized the State Tax Department to administer, enforce and collect any local sales and service or use tax. That bill also authorized the Tax Department to set a fee for such administration and authorized the promulgation of a legislative rule to set that fee.

This rule is necessary to provide the appropriate calculation of the administrative fee that the tax department needs to effectively administer these taxes for municipalities. This rule is likewise necessary to provide appropriate clarification on the extent of the administrative responsibilities delegated to the Tax Commissioner.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Municipal Sales and Service and use Tax Administration (110 CSR 28)

Type of Rule: [X] Legislative [ ] Interpretive [ ] Procedural

Agency: State Tax Department

Address: 1001 Lee Street
Charleston, WV 25301

Phone Number: (304) 558-5330 Email:

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The Rule, as written, explains and clarifies all municipal sales and use taxes imposed under the provisions of W. Va. Code §8-1-5a et seq. and W. Va. Code §8-13C-8 and defines and clarifies the State Tax Department periodic fee and its calculation.

This fiscal note summary reflects the costs of implementation of necessary State tax administration associated with the recent enactment of Municipal Home Rule legislation allowing up to 20 municipalities to impose a local sales and use tax.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	300,000.00	1,000,000.00
Personal Services	0.00	70,000.00	700,000.00
Current Expenses	0.00	30,000.00	100,000.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	200,000.00	200,000.00
2. Estimated Total Revenues	0.00	440,000.00	1,000,000.00

Rule Title: _____

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

The State Tax Department will incur significant additional administrative expenses associated with the implementation of local municipal sales taxes per the allowance of the recently enacted Municipal Home Rule Bill. These costs would be recouped through an administrative fee as determined by this Rule. The administrative fee would offset an amortized start-up cost for the implementation of a new sales and use tax as well as ongoing administrative costs related to collection, compliance, accounting, audit and taxpayer service functions necessary to administer the local tax. The added services are necessary to help businesses comply with the complexities associated with a local tax imposed within limited geographic subset areas of the State.

State governments around the country typically recoup their expenses associated with the administration of local sales taxes through the imposition of a fee against the gross proceeds of such local tax. In the alternative, State Taxpayers would have to subsidize the additional administrative costs through additional State allocated resources for tax administration. Due to economies of scale, smaller states such as West Virginia must impose a larger fee to fully recoup administrative costs on local sales tax collections than larger states, especially those with large scale county option sales taxes.

Since each implementation of a local sales tax requires substantial up-front expenditures, the State Tax Department incurs these costs prior to any local sales tax revenue being collected against which a retainage fee can be applied. The Rule provides for the recovery of the up-front implementation costs and the ongoing administration costs over time. One alternative to the State Tax Department periodic fee

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: _____

Signature of Agency Head or Authorized Representative

_____

TITLE 110
LEGISLATIVE RULE
DEPARTMENT OF TAX AND REVENUE

SERIES 28
MUNICIPAL SALES AND SERVICE AND USE TAX ADMINISTRATION

§110-28-1. General.

1.1. Scope. -- These legislative rules explain and clarify administrative and procedural requirements and characteristics of municipal sales and use taxes imposed under the provisions of W. Va. Code §8-1-5a et seq. and W. Va. Code §8-13C-1, et. seq..

1.1.a. In recognition of:

The experience, knowledge, and technical, and legal expertise of the Tax Department,

The computer and logistical systems currently operated and maintained by the Tax Department,

The auditing and revenue processing resources of the Tax Department, and

The obvious cost efficiency and operational efficiencies of placing municipal consumers sales and service tax and use tax administration under the exclusive authority of the Tax Department --

The Legislature has determined that the preeminent interest of all municipal consumers sales and service tax and use tax jurisdictions is best served by empowerment of the Tax Commissioner, by law, to hold, maintain and exercise sole authority to administer the municipal consumers sales and service tax and use tax.

1.1.b Pursuant to Legislative intent that the Tax Department administer the municipal consumers sales and service tax and use tax, this rule sets forth procedures and requirements for such administration.

1.1.c. Pursuant to Legislative intent that the General Fund not be burdened with costs of administration of the municipal consumers sales and service tax and use tax, this rule sets forth procedures and requirements for statutorily mandated recovery of Tax Department costs incurred in such administration.

1.2. Authority. -- W. Va. Code §11-10-11c.

1.3. Filing Date. --

1.4. Effective Date. --

§110-28-2. Definitions.

2.1. "Accumulated cost account" means the total pooled amount of all implementation costs and all operating costs incurred by the Tax Department on and after the commencement date for recoverable cost accrual. The accumulated cost account is added to periodically as costs are incurred. The accumulated cost account is drawn down by the periodic cost recovery fee. After any periodic offset of the accumulated cost account by the periodic cost recovery fee or any other adjustment, any amount remaining in the accumulated cost account, carries forward into future periods, and may be further offset from time to time as the periodic cost recovery fee is applied in

succeeding periods.

2.2 "Allocation numerator" means revenues of a specific revenue generating municipality for the period under the provisions, as applicable, of W. Va. Code §8-1-5a (Home Rule Pilot Plan) or W. Va. Code §8-13C-1 et seq. (Municipal sales and use tax), net of refunds and net of adjustments for filing errors, payment errors, and similar adjustments for the period, but before offset by the periodic cost recovery fee and before application of the reconciliation adjustment.

2.3 "Allocable revenues" means total net tax revenues, as herein defined, after offset by the periodic cost recovery fee and after application of the reconciliation adjustment. Allocable revenues are periodically distributed to each revenue generating municipality in proportion to the amount that each allocation numerator (as herein defined) for the period, bears to total net tax revenues (as herein defined) for the period.

2.4. "Excise tax" means collectively the special district excise tax authorized under W.Va. Code §7-22-1 et. seq. and W.Va. Code §8-38-1 et. seq.

2.5. "Implementation cost" means the total aggregate cost incurred by the Tax Department for initial implementation of tax administration for, or related to, all program municipalities. Implementation cost includes, but is not limited to, the initial costs incurred by the Tax Department to: hire and train personnel, configure record keeping systems, design forms, configure remittance processing systems and auditing and verification processes, implement and test computer programming, build and input municipal mapping and boundaries databases and zip code databases and configure and set up systems for distribution of revenues to each municipal taxing jurisdiction, and undertake other necessary costs to set up an administration system for collecting and distributing allocable revenues derived from municipal consumers sales and service tax and use tax revenues for program municipalities.

2.6. "Municipal consumers sales and service tax and use tax" and "municipal consumers sales tax" and "municipal sales and service tax" and "municipal use tax" mean and refer to, collectively, any tax authorized under the provisions of W.Va. Code §8-1-5a (Home Rule Pilot Plan) or W. Va. Code §8-13C-1 et seq. (Municipal sales and use tax).

2.7. "Net tax revenues" means the total pooled amount of all revenues under the provisions, as applicable, of W.Va. Code §8-1-5a (Home Rule Pilot Plan) or W.Va. Code §8-13C-1 et seq. (Municipal sales tax), of all revenue generating municipalities, for the period, net of refunds and net of adjustments for filing errors, payment errors, and similar adjustments for the period, and after application of the reconciliation adjustment for the period, but before offset by the periodic cost recovery fee.

2.8. "Operating cost" means the total aggregate cost incurred by the Tax Department for direct and indirect ongoing costs incurred to administer taxes imposed pursuant to the authority of W.Va. Code §8-1-5a (Home Rule Pilot Plan) or W.Va. Code §8-13C-1 et seq. (Municipal sales tax), for, or related to, all program municipalities. Operating cost includes, but is not limited to, costs of day to day operations for processing and verifying tax returns and remittances, verifying and issuing tax refunds, processing and correcting filing and payment errors, calculating and issuing periodic distributions of tax revenues back to revenue generating municipalities, administering the interface between the State and Streamlined sales and use tax administrators for municipal consumers sales and service tax and use tax, administering rate changes, changes and updates to municipal boundaries and changes and updates to the vendor database for program municipalities.

2.9 "Period," "the period" or "periodic" means and refers to the tax period or accounting period, applicable in the context of the usage of the term, and may refer to a monthly, quarterly, semi-annual or annual time period, or such other time period as may be prescribed by the Tax Commissioner.

2.10. "Periodic cost recovery fee" -- The periodic cost recovery fee is retained by the Tax Department to recover those costs aggregated in the accumulated cost account. "Periodic cost recovery fee" means the lesser of:

2.10.a. The total balance in the accumulated cost account; or

2.10.b. 5% of net tax revenues for the period.

2.11. "Program municipalities" means all municipalities that have achieved full legal authorization to impose and implement a municipal consumers sales and service tax and use tax under the provisions of West Virginia Code § 8-1-5a (Home Rule Pilot Plan) or 8-13C-1 et seq. (municipal consumers sales and service tax and use tax). A municipality shall not be treated as a program municipality until actual tax collections have begun.

2.12. "Reconciliation adjustment" means the adjustment for the variance between the amount of the projected periodic cost recovery fee applied in a fiscal year versus the periodic cost recovery fee actually calculated for the fiscal year. The adjustment is the amount to be added to net tax revenues or subtracted from net tax revenues (among other adjustments) to determine allocable revenues. See discussion in section 4.11. of this rule.

2.13. "Revenue generating municipalities" means those municipalities that have generated tax revenues for the period under the provisions, as applicable, of W.Va. Code §8-1-5a (Home Rule Pilot Plan) or W.Va. Code §8-13C-1 et seq. (Municipal sales tax), net of refunds and net of adjustments for filing errors, payment errors, and similar adjustments for the period, but before offset by the periodic cost recovery fee and before application of the reconciliation adjustment for the period.

§110-28-3. Tax Base.

Any municipal sales and service tax and municipal use tax imposed under the authority granted by W. Va. Code §8-1-5a et seq. and W. Va. Code §8-13C-1 et seq. is subject to the following:

3.1. The base of a municipal sales and service tax and municipal use tax imposed shall be identical to the base of the consumers sales and service tax imposed pursuant to W.Va. Code §11-15-1 *et seq.* on sales made and services rendered and on the use of tangible personal property, custom software or taxable services within the boundaries of the municipality, subject to the following:

3.1.a. Except for the exemption provided in W.Va. Code §11-15-9f, all exemptions and exceptions from consumers sales and service tax apply to a municipal sales and service tax and municipal use tax;

3.1.b. Sales of gasoline and special fuel are not subject to a municipal sales and service tax or municipal use tax;

3.1.c. Sales of motor vehicles taxable under W.Va. Code §11-15-3c are not subject to a municipal sales and service tax or municipal use tax; and

3.1.d. Sales that are not subject to a municipal sales and service tax or use tax because they are exempt as otherwise provided by law.

3.2. Any municipal sales and service tax and municipal use tax imposed applies solely to tangible personal property, custom software and services that are sourced to the municipality. The sourcing rules set forth in W. Va. Code §11-15B-1 *et seq.*, including any amendments thereto, apply to any municipal sales and service tax and municipal use tax levied.

§110-28-4. Administration and Collection of Tax.

4.1. Any municipality that imposes a municipal sales and service tax and municipal use tax may not administer or collect the tax, but shall use the services of the Tax Commissioner to administer, enforce and collect the tax imposed in the same manner as the state consumers sales and service tax and use tax. The provisions of articles fifteen, fifteen-a and fifteen-b, chapter eleven of the W. Va. Code and the provisions of W.Va. CSR §110-15-1 et. seq. shall apply to the implementation and administration of any municipal sales and service tax and municipal use tax imposed and all provisions of those enactments shall be read in extenso herein.

4.2. Any municipal sales and service tax and municipal use tax shall be imposed in addition to the consumers sales and service tax and use tax imposed pursuant to articles fifteen and fifteen-a, chapter eleven of the West Virginia Code on sales made and services rendered and on the use of tangible personal property, custom software or taxable services within the boundaries of the municipality and, except as exempted or excepted, all sales made and services rendered and on the use of tangible personal property, custom software or taxable services within the boundaries of the municipality shall remain subject to the tax levied by those articles.

4.3. Any municipal sales and service tax and municipal use tax shall be imposed in addition to any tax imposed pursuant to W.Va. Code §7-22-1, W.Va. Code §§ 8-13-6 and 8-13-7and W.Va. Code §8-38-12. The municipal sales and service tax and municipal use tax which is collected or sourced in any special district in which tax is imposed pursuant to W.Va. Code §7-22-1, W.Va. Code §§8-13-6 and 8-13-7 and W.Va. Code §8-38-12, is hereby deemed to be special district excise tax subject to the provisions of the Code under which the applicable special district is created. Municipal sales and service tax and municipal use tax which is collected or sourced in any such special district shall be administered, collected, remitted, and distributed according to the applicable requirements W.Va. Code §7-22-1, W.Va. Code §§8-13-6 and 8-13-7and W.Va. Code §8-38-12, with like effect as if such W. Va. Code provisions were applicable only to the taxes imposed pursuant to the provisions of W. Va. Code §8-1-5a et seq. and W. Va. Code §8-13C-1, et. seq., and were set forth in extenso therein.

4.4. Collection by Vendor. - Each vendor shall collect from the purchaser municipal sales and service tax and municipal use tax imposed upon each sale of tangible personal property and service in the municipality at the same time and in the same manner as each vendor collects from the purchaser the state consumers sales and service tax and use tax. Municipal sales and service tax and municipal use shall be added to and constitute a part of the sales price.

4.5. Collection by Retailer. - Every retailer engaging in business in this State and making sales of tangible personal property or taxable services for delivery into a municipality that has imposed any municipal sales and service tax and municipal use tax or with knowledge, directly or indirectly, that the property or services are intended for use in such municipality, shall at the time of making such sales, whether within or without the State, collect the municipal use tax before or at the time such tax accrues from the purchaser in the same manner that each retailer collects the state use tax from the purchaser. Such tax shall be added to and constitute a part of the sales price and the retailer must give to the purchaser a receipt therefor with the tax separately stated thereon.

4.6. Exceptions to Collection Requirements. - Notwithstanding Sections 4.4 and 4.5 of these rules, no municipal sales and service tax and municipal use tax need be collected by the vendor or retailer with respect to a transaction if the state consumers sales and service and use tax need not be collected under the provisions of the consumers sales and service and use tax, as if such provisions were set forth herein in extenso.

4.7. The Tax Commissioner may prescribe such processes, procedures, forms, schedules and other administrative requirements as the Tax Commissioner may determine to be useful or convenient for the efficient administration of the municipal consumers sales and service tax and use taxes addressed under this rule. The Tax Commissioner may require certified copies of the ordinance imposing the taxes, or changing the rate in a tax, along with a certified

description of the boundaries of the municipality, the nine-digit zip codes for addresses located within the boundaries of the municipality, the certified designation of a municipal official to whom all notices and communications are to be sent and from whom all notices and communications are to be sent, and certified documentation of such other information as the Tax Commissioner may need to administer, collect and enforce the taxes administered under this rule .

4.8. To the extent that they may be reasonably subject to computation, the Tax Commissioner may annually issue an Administrative Notice, to be published on or before the first day of June of each year in the State Register, setting forth projections or determinations of:

4.8.a. The projected beginning and ending balances of the accumulated cost account for the fiscal year beginning 30 days after the June 1 issuance date, and

4.8.b. the projected offsets and adjustments to the accumulated cost account projected for such fiscal year (principally the projected periodic cost recovery fee), and

4.8.c. The reconciliation adjustment that will be applied to determine allocable revenues in such fiscal year.

4.8.d. Tax Department's projection of the amount of the periodic cost recovery fee that will be applied against net tax revenues during such fiscal year.

4.8.e. The projected amount of total allocable revenues such fiscal year, and

4.8.f. At the sole discretion of the Tax Commissioner, projected allocable revenues to be distributed to each separate revenue generating municipality, on annual or other periodic basis, as the Tax Commissioner may determine, in such fiscal year, and

4.8.g. Such other data and information as the Tax Commissioner may elect to include.

4.9. Provided, that: The Tax Commissioner may elect to issue a notice other than, or in addition to, an Administrative Notice, and may elect to publish the Administrative Notice or any other such notice, by means other than, or in addition to, the State Register.

4.10. The Tax Commissioner may, solicit comments or recommendations regarding such projections, determinations and data for a period of approximately 30 days, and in response thereto, may reissue the notice, as amended, on or about the July 1 next succeeding the initial publication date.

4.11. The periodic cost recovery fee is an amount retained from municipal consumers sales and service tax and use tax proceeds by the Tax Department to recover those costs reflected and aggregated in the accumulated cost account.

4.11.a. Instead of applying the periodic cost recovery fee to offset net tax revenues in a given period, the Tax Department may, at the election of the Tax Commissioner, apply a projected periodic cost recovery fee against net tax revenues for a given period and then may add or subtract a reconciliation adjustment to net tax revenues for the next succeeding period, to reconcile the difference between the projected periodic cost recovery fee as applied in that previous period and the periodic cost recovery fee actually attributable to that previous period.

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4.11.b. Such periodic cost recovery fee shall not apply to the collection by the Tax Commissioner of the Excise Tax provided for in W.Va. Code §7-22-1 et seq. and W.Va. Code §8-38-1 et seq. as such collection is not

provided for pursuant to W.Va. Code§11-10-11c and other applicable provisions of law, as that fee is limited to the fee authorized by W.Va. Code §11-10-11b.

§110-28-5. Remittance of Tax.

5.1. No profit shall accrue to any person as a result of the collection of the municipal sales and service tax regardless of the fact that the total amount of such taxes collected may be in excess of the amount for which such person would be liable by the application of the levy set forth by the municipality, not to exceed one percent, to the gross proceeds of his sales. The total of all municipal sales and service and use taxes collected by any such person shall be returned and remitted to the Tax Commissioner.

5.2. Any person who is required to collect and remit the consumers sales and service tax or the use tax and who was also required to pay such taxes on purchases of tangible personal property or services for use or consumption in his business may utilize one of the following procedures when paying the municipal sales and service and use tax collected to the Tax Commissioner.

5.2.a. Such person may separately remit the amount collected and pay the amount due and owing on his purchases made using the direct pay permit procedure.

5.2.b. Such person may credit the amount of tax paid on his purchases for which an exemption is claimed against the amount of tax collected and:

5.2.b.1. if the amount collected is greater than the amount of tax paid on his exempt purchases, he shall remit the difference to the Tax Commissioner; or

5.2.b.2. if the amount of tax paid on his exempt purchases is greater than the amount collected, he may seek a refund or credit for the difference as provided by law.

5.2.c. A person shall use the same means to collect and remit municipal sales and service and use tax as the person uses to collect and remit the consumers sales and service tax and use tax.

5.3. Sales and Service Tax Return and Payment- Any municipal sales and service and use tax that a person is required to collect and remit to the State Tax Commissioner shall be provided for in the same return that such person is required to file under the consumers sales and service tax and use tax.

5.4. When no state tax liability – Any person subject to the municipal sales and service and use tax that has no liability for the state consumers sales and service and use tax, must still remit the municipal sales and service and use tax in a manner consistent with this rule.

§110-28-6. Appeals, Standards and Jurisdiction

6.1. The Office of Tax Appeals has exclusive and original jurisdiction to hear appeals arising from issues set forth in section 6.3 of this rule for which the Tax Commissioner has administration, enforcement and collection responsibility under W. Va. Code §8-1-5a et seq. and W. Va. Code §8-13C-1, et. seq., to the extent provided in this rule or for excise taxes, as herein defined.

6.1.a. The Office of Tax Appeals has no authority to hear challenges, disputes or other issues relating to the periodic cost recovery fee or any aspect of the Tax Commissioner's cost recovery authorized by statute and addressed in this rule.

6.1.b. The Office of Tax Appeals has no authority to hear challenges, disputes or other issues relating to the amount of money distributed to any municipality pursuant to W. Va. Code §8-1-5a et seq. and W. Va. Code §8-13C-1, et. seq., or the provisions of this rule or to the methodology of calculating, determining or allocating any such money.

6.1.c. The Office of Tax Appeals has no authority to hear challenges, disputes or other issues relating to the methodology for calculating or determining the periodic cost recovery fee, the amount of the periodic cost recovery fee, or application of the periodic cost recovery fee as an offset against net tax revenues.

6.2. No municipality or county has standing before the Office of Tax Appeals in any dispute arising under any local sales and use tax and excise tax.

6.3. Any review of a municipal sales and service and use tax and excise tax by the Office of Tax Appeals is limited to the following:

6.3.a. Appeals from tax assessments issued by the Tax Commissioner pursuant to W.Va. Code § 11-10-1 et seq. and this rule;

6.3.b. Appeals from decisions or orders of the Tax Commissioner denying refunds or credits for all municipal sales and service and use tax and excise tax administered in accordance with this rule;

6.4. No municipality or county may engage in or participate in any audit, either performed by the Tax Commissioner or by the municipality or county itself, arising under any local sales and use tax and excise tax.

6.5. No municipality or county may hold the Tax Commissioner responsible for any unpaid or unrealized municipal sales and service and use tax.

§110-28-7. Quarterly distribution of collections; Periodic cost recovery fee; Fund administration.

7.1. Distributions of allocable revenues collected during each calendar quarter to each revenue generating municipality shall be made not later than the 15th business day of the month following the close of the quarter in which the tax was remitted to the Tax Department. Timely distribution is deemed to have occurred when the Tax Department issues the request for transfer to the State Treasurer. The Tax Commissioner is deemed to have fulfilled the responsibility for distribution of allocable revenues upon issuance of the request for transfer to the State Treasurer.

7.1.a. Each municipality shall record and account for distributions of the taxes administered under this rule on the books and records of the municipality as a single discrete payment. No expenditure, cost or offset shall be recorded or accounted for by the municipality for refunds, reconciliation adjustments, the periodic cost recovery fee, adjustments for filing errors, adjustments for payment errors, and similar adjustments. The municipality effectuates the municipal consumers sales and service tax and use tax only pursuant to statutory authorization. Under that statute, the Tax Commissioner is designated as the sole administrator of the taxes collected and distributed under this rule. Therefore all costs, charges, refunds, offsets, adjustments and fees are deemed to be administered at the Tax Department level of the process.

7.2. A fee, to be retained by the Tax Commissioner, is authorized by statute for collecting, enforcing and administering the municipal sales and service and use tax. That fee is equal to the periodic cost recovery fee calculated under the provisions of this rule. Recoverable cost accrual shall commence on the effective date of Senate Bill 435, enacted during the Regular Legislative Session of 2013. Such fee shall be retained by the Tax Commissioner from proceeds of municipal sales and service and use tax collected for program municipalities. The

Tax Commissioner shall deposit all the proceeds from a municipal sales and service and use tax collected for program municipalities, minus any fee for collecting, enforcing and administering taxes, in the appropriate subaccount. Provided, that such periodic cost recovery fee shall not apply to the collection by the Tax Commissioner of the Excise Tax provided for in W.Va. Code §7-22-1 et seq. and W.Va. Code §8-38-1 et seq. as such collection is not provided for pursuant to W.Va. Code§11-10-11c and other applicable provisions of law, as that fee is limited to the fee authorized by W.Va. Code §11-10-11b.

7.3. The following items shall be deposited into the "Local Sales Tax and Excise Tax Administration Fund" created by W.Va. Code §11-10-11c.

7.3.a. The periodic cost recovery fee, calculated pursuant to this rule.

7.3.b. Any amounts received on and after July 1, 2013, from fees retained by the Tax Commissioner pursuant to the authorization provided in W.Va. Code §8-13C-6;

7.3.c. Amounts deducted and retained by the Tax Commissioner under W.Va. Code §11-10-11b;

7.3.d. Any future amounts appropriated by the Legislature or transferred by any public agency as contemplated or permitted by applicable federal or state law; and

7.3.e. All moneys in the Tax Department "Municipal Sales and Use Tax Operations Fund" established under W.Va. Code §8-13C-6 that were transferred to the "Local Sales Tax and Excise Tax Administration Fund" on July 1, 2013 as provided in W.Va. Code §11-10-11c.

7.3.f. All moneys in the "Special District Excise Tax Administration Fund" established under W.Va. Code §11-10-11b that were transferred to the "Local Sales Tax and Excise Tax Administration Fund" on July 1, 2013 as provided in W.Va. Code §11-10-11c.

7.3.g. Any accrued interest or other return on the moneys in the fund.

7.4. Any amounts in the fund may be expended by the Tax Commissioner for the general administration, collection and enforcement of all municipal sales and use taxes and excise taxes. Provided, that such expenditure is limited to the amount appropriated by the legislature for any fiscal year after fiscal year 2014. Such expenditures may include, but are not be limited to, general administration expenses, such as:

7.4.a. Operating cost; and

7.4.b. Implementation cost.

§110-28-8. Notification; Effective Date of tax

8.1. Any jurisdiction that imposes a municipal sales and service and use tax, and any jurisdiction that changes the rate of such tax shall notify the Tax Commissioner at least 180 days before the effective date of the imposition of the taxes or the change in the rate of the taxes. Provided, that such effective date must begin on the July 1 next succeeding 180 days' notice to the Tax Commissioner of the imposition of the taxes or the change in the rate of the taxes. Such notification shall include a certified copy of the ordinance imposing the taxes, or changing the rate in a tax, along with a description of the boundaries of the city, the nine-digit zip codes for addresses located within the boundaries of the City and such other information as the Tax Commissioner may need to administer, collect and enforce the taxes administered under this rule.

8.1.a. Exception. Any jurisdiction that imposes a municipal sales and service and use tax prior to July 1, 2015 may notify the Tax Commissioner 150 days before the effective date of the imposition of the tax. Provided, that such effective date must begin on the first day of a calendar quarter. Such notification shall include a certified copy of the ordinance imposing the taxes, along with a description of the boundaries of the city, the nine-digit zip codes for addresses located within the boundaries of the City and such other information as the Tax Commissioner may need to administer, collect and enforce the taxes imposed by this article.

8.2. If any jurisdiction in which a municipal sales and service and use tax has been imposed, changes or alters its boundaries, such jurisdiction must provide a certified copy of the ordinance adding or detaching territory from the city to the Tax Commissioner. The ordinance must reflect the effective date of the change, and must be accompanied by a map of the city clearly showing the territory added or detached and the information specified in §8.1. of this rule. Provided, that any municipal sales and service tax or use tax will not be effective on the new boundary until the July 1st following 180 days' notice to the Tax Commissioner of the change in boundary.

8.3. Upon notification, each municipality and county must provide the Tax Commissioner with a designated agent to send and receive all information relating to the administration, enforcement, collection and distribution of any municipal sales and service tax and use tax or any excise tax. The county must keep the Tax Commissioner updated with any change in the designated agent.

STEPTOE & JOHNSON PLLC
ATTORNEYS AT LAW

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FACSIMILE TRANSMISSION

	RECIPIENT	COMPANY	PHONE NO.	FAX NO.
TO:	Mark S. Morton	Department of Tax and Revenue		(304) 558-8728

FROM: Thomas L. Aman Steptoe & Johnson PLLC (304) 933-8136

DATE: July 24, 2013

NUMBER OF PAGES (including this coversheet): 4

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COMMENTS:

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MONONGALIA COUNTY COMMISSION

243 HIGH STREET, ROOM 202
COURTHOUSE
MORGANTOWN, WEST VIRGINIA 26505

L.W. "Bill" Bartolo, Commissioner
Eldon A. Callen, Commissioner
Tom Bloom, Commissioner

Telephone: 304 291-7257

July 24, 2013

West Virginia State Tax Department
Legal Division
Attn: Mark S. Morton
General Counsel for Revenue Operations
P.O. Box 1005
Charleston, West Virginia 25324-1005

Re: Comments on Proposed Legislative Rule- Municipal Sales and Service and Use Tax Administration- 110 CSR 28

Dear Mr. Morton,

This letter is being provided in response to the "Notice of a Comment Period on a Proposed Rule" filed by the State Tax Department on June 25, 2013 with the Administrative Law Division of the West Virginia Secretary of State's Office with respect to the proposed Legislative Rule entitled "Municipal Sales and Service and Use Tax Administration" which would be codified at §110 CSR 28 (the "Proposed Rule").

The County Commission of Monongalia County (the "County Commission") has an interest in the Proposed Rule because, as you may be aware, the County Commission entered an Order on July 17, 2013 which created the University Town Centre Economic Opportunity Development District (the "District") pursuant to Chapter 7, Article 22 of the Code of West Virginia 1931, as amended (the "County Excise Tax Act"). The County Commission anticipates issuing bonds or other financing obligations which would pledge special district excise tax revenues which are generated in the District to their repayment under and pursuant to the County Excise Tax Act. Any potential increase in administrative fees which might be imposed by the State Tax Department in connection with the collection of special district excise taxes by the State Tax Department for the District which are in excess of the 1% fee which is authorized to be collected pursuant to W. Va. Code § 11-10-11a(e) would have a negative impact on available funds to repay such financing obligations and such negative impact would need to be disclosed to investors or potential investors in such financing obligations. The negative impacts and disclosure consequences of any increase in such administrative fees would be heightened for the

County Commission if the same were to be implemented by the State Tax Department subsequent to the issuance of financing obligations by the County Commission.

These comments are being provided in order to request clarification from the State Tax Department in the Proposed Rule in order to make clear that the maximum 5% administrative fee which the Tax Commissioner would have authority to impose upon municipal sales and use taxes collected by the State Tax Department as described in the Proposed Rule would have no applicability to special district excise taxes collected by the State Tax Department pursuant to the County Excise Tax Act and Chapter 8, Article 38 of the Code of West Virginia 1931, as amended (the "Municipal Excise Tax Act").

The Proposed Rule states that it explains and clarifies "administrative and procedural requirements and characteristics of municipal sales and use taxes imposed under the provisions of W.Va. Code §8-1-5a et seq. and W.Va. Code §8-13C-8". W.Va. Code §8-1-5a relates to the extension of the municipal home rule pilot program in West Virginia which would permit up to 20 selected municipalities to exercise limited home rule powers in a supervised fashion during the term of the pilot program. These powers could include the imposition of municipal sales and use taxes by the selected municipalities. W.Va. Code §8-13C-1 et seq. provides authorization for municipalities to impose a sales and use tax if it does not impose, or ceases to impose, the business and occupation tax authorized under W.Va. Code § 8-13-5, and for the purpose of funding accrued unfunded pension liabilities for certain municipalities.

The Proposed Rule also provides that "[a] fee, to be retained by the Tax Commissioner, is authorized by statute for collecting, enforcing and administering the municipal sales and service and use tax." West Virginia CSR §110-28-7.2. The fee is equal to the periodic cost recovery *fee* calculated under the provisions of the Proposed Rule. See Id. The periodic cost recovery *fee* is equal to the lesser of the total balance in the accumulated cost account (as defined and described in the Proposed Rule) or 5% of net tax revenues for the period (the "Administrative Fee"). West Virginia CSR §110-28-2.10. "Such fee shall be retained by the Tax Commissioner from proceeds of municipal sales and service and use tax collected for program municipalities." West Virginia CSR §110-28-7.2. Program municipalities are defined by the Proposed Rule to include "all municipalities that have achieved full legal authorization to impose and implement a municipal consumers sales and service tax and use tax under the provisions of West Virginia Code § 8-1-5a (Home Rule Pilot Plan) or West Virginia Code 8-13C-1 et seq. (municipal consumers sales and service tax and use tax)." West Virginia CSR §110-28-2.11. Thus, pursuant to the Proposed Rule, the Administrative Fee is to apply only to municipal sales and use taxes imposed by West Virginia municipalities pursuant to the home rule pilot program or pursuant to Chapter 8, Article 13C. This would preclude the applicability of the Administrative Fee to special district excise taxes collected by the Tax Department pursuant to the County Excise Tax Act and the Municipal Excise Tax Act. This is consisted with W.Va. Code §11-101 1 c (the "Authorizing Legislation"), which authorized the promulgation of the Proposed Rule, which provides that "the Tax Commissioner may assess a fee, to be established by legislative rule, pursuant to the provisions of article three, chapter twenty nine-a of this code, to be retained from collections authorized by section five-a, article one, chapter eight of this code, and section six, article thirteen-c, chapter eight of this code . . ." W.Va. Code §11-10-11c(c). Thus, the terms of the Authorizing Legislation also limit the applicability of the Administrative Fee to municipal sales and use taxes collected by

the Tax Department on behalf of municipalities pursuant to the home rule pilot program and Chapter 8, Article 13C.

Although both the Authorizing Legislation and the Proposed Rule provide for the same, we feel that the Proposed Rule should be clarified to make more explicit that the Administrative Fee would have no applicability to special district excise taxes collected by the Tax Department pursuant to the County Excise Tax Act or Municipal Excise Tax Act. We propose that this might best be accomplished by adding the following language at the end of the paragraphs which are currently contained in Section 4.11 and Section 7.2 of the Proposed Rule: "Provided, however, that such periodic cost recovery fee shall not apply to the collection by the Tax Commissioner of the Excise Tax provided for in W.Va. Code §7-22-1 et seq. and W.Va. Code §8-38-1 et seq. as such collection is not provided for pursuant to W.Va. Code §11-10-11c and other applicable provisions of law."

Monongalia County Commission,

Eldon A. Callen,
President

L. W. Bartolo,
Commissioner

Tom Bloom,
Commissioner

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TRANSACTION REPORT

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SPILMAN THOMAS & BATTLE, PLLC
ATTORNEYS AT LAW

Dale W. Steager
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July 23, 2013

Via Hand Delivery

The Honorable Robert S. Kiss
Cabinet Secretary
Department of Revenue
State Capitol, Building 1, W-300
Charleston, WV 25305

The Honorable Mark W. Matkovich
Acting Tax Commissioner
West Virginia State Tax Department
1001 Lee Street, East
Charleston, WV 25301

Re: Comments of City of Charleston, West Virginia, Concerning Proposed Legislative Rule 110-28, Municipal Sales and Use Tax Administration

Dear Secretary Kiss and Commissioner Matkovich:

Please be advised that Spilman Thomas & Battle, PLLC, has been assisting the City of Charleston, West Virginia, in its effort to impose a municipal sales and use tax pursuant to W. Va. Code § 8-1-5a and in conformity with the requirements of W. Va. Code § 11-15B-1 *et seq.* The City's sales and use tax ordinance was adopted by City Council on May 20, 2013, and will be collected by the State Tax Commissioner beginning October 1, 2013.

Enclosed are comments of the City of Charleston, West Virginia, concerning proposed legislative rule 110-28 pertaining to municipal sales and use tax administration. A copy of these comments is being provided to Mark S. Morton in accordance with the Notice of a Comment Period on a Proposed Rule published in the State Register on June 28, 2013.

Sincerely,

Dale W. Steager

Dale W. Steager

DWS/ljr
Enclosure
cc/w/enc: *Via Hand Delivery:*
Mark S. Morton, Esq.
Danny Jones, Mayor
David Molgaard, City Manager
Paul D. Ellis, City Attorney
Joe Estep, Director of Finance
Via U.S. Mail:
Bobby Reishman

5087674v3 (477.326)

COMMENTS of the CITY OF CHARLESTON, WEST VIRGINIA ON PROPOSED STATE TAX DEPARTMENT LEGISLATIVE RULE 110-28 REGARDING FEES FOR ADMINISTERING, COLLECTING AND ENFORCING MUNICIPAL SALES AND USE TAXES

I. INTRODUCTION:

On June 25, 2013, Notice of Comment Period on Proposed Legislative Rule 110-28 was filed in the State Register. The Secretary of State published this Notice, but not the text of the proposed rule, on June 28, 2013, in Volume XXX, Issue 26 of the State Register, at page 1148. The title of the proposed rule is "Municipal Sales and Use Tax Administration." The rule is being proposed pursuant to W. Va. Code § 11-10-11c, which although effective from passage on April 18, 2013, has a delayed internal effective date of July 1, 2013.

As of July 1, 2013, six municipalities in West Virginia impose sales and use taxes. They are Charleston, Huntington, Quinwood, Rupert, Wheeling, and Williamstown. The Tax Commissioner currently collects sales and use taxes for the municipalities of Huntington, Rupert and Williamstown. The taxes imposed by Charleston, Quinwood and Wheeling will be collected beginning October 1, 2013.

The sales and use taxes imposed by Charleston, Huntington and Wheeling, West Virginia, are imposed pursuant to W. Va. Code § 8-1-5a (2007) (pilot program to increase powers of municipal self-government). The sales and use taxes imposed by Quinwood, Rupert and Williamstown are imposed pursuant to W. Va. Code §§ 8-13C-4(b) and 8-13C-5(b) (alternative municipal sales and use taxes).

Pursuant to W. Va. Code § 8-1-5a, as amended during the 2013 Regular Session of the Legislature, by Senate Bill No. 435, a total of 20 municipalities will be allowed to participate in the expanded municipal home rule pilot program including the four original participating municipalities. Theoretically, 17[1] additional municipalities could be authorized by the Municipal Home Rule Board established in W. Va. Code § 8-1-5a(e) to impose municipal sales and use taxes. Additionally, there are approximately 114 municipalities that currently do not impose a municipal business and occupation tax that theoretically could decide to impose municipal sales and use taxes pursuant to W. Va. Code §§ 8-13C-4(b) and 8-13C-5(b) without having to apply to the Municipal Home Rule Board.

In addition to municipal sales and use taxes, the Tax Commissioner collects special district excise taxes imposed by the County Commissions of Harrison and Ohio Counties, West Virginia, pursuant to W. Va. Code § 7-22-9. The tax levied by the Ohio County Commission is for the benefit of the Fort Henry Economic Opportunity Development Project District. The tax levied by the Harrison County Commission is for the benefit of the Charles

[1] Bridgeport, West Virginia, is the fourth municipality participating in the Municipal Home Rule Pilot Project created in 2007. Bridgeport does not currently impose a sales and uses tax but could decide sometime in the future to apply to the Municipal Home Rule Board for authority to impose such taxes.

Pointe Economic Opportunity Development District.[2] Special district excise taxes are imposed in lieu of the state consumers sales and service tax and are not imposed in addition to the state tax.

Since July 1, 2013, all fees for collecting local sales and use taxes imposed by municipalities pursuant to W. Va. Code §§ 8-1-5a and 8-13C-4, as well as special district excise taxes imposed pursuant to W. Va. Code §§ 7-22-9 and 8-38-9[3], are deposited into the "Local Sales Tax and Excise Tax Administration Fund" established in W. Va. Code § 11-10-11c(d). The fee imposed by W. Va. Code § 11-10-11c and proposed legislative rule 110-28 applies only to municipal sales and use taxes. The Tax Commissioner's fee for administration, collection and enforcement of special district excise taxes remains one percent of collections as provided in W. Va. Code § 11-10-11a(e).

II. COMMENTS ON THE PROPOSED REGULATIONS:

A. Overview of the Proposed Rule:

The proposed legislative rule indicates that the purposes of the proposed rule are to (a) provide the appropriate calculation of the administrative fee that the State Tax Department needs to effectively administer sales and use taxes for municipalities, and (b) provide clarification on the extent of the administrative responsibilities delegated to the Tax Commissioner.

The State Tax Department contends that it will incur significant additional administrative expenses associated with the implementation of local municipal sales taxes as a result of enactment of Senate Bill No. 435 extending the Municipal Home Rule Pilot Project and expanding the program so that 20 municipalities may be allowed to participate in the Pilot Project.

These additional administrative expenses incurred by the Tax Department to administer, collect and enforce local sales and use taxes would be recouped through an administrative fee as determined by the proposed rule, which annually may not exceed five percent of the net sales and use taxes collected for the municipality during the year. Fees incurred in one fiscal year but not recovered in that fiscal year would be carried forward from year to year until recovered. The administrative fee would offset an amortized start-up cost for the implementation of a new sales and use tax, as well as ongoing administrative costs related to collection, compliance, accounting, audit and taxpayer service functions necessary to administer the local tax. The added services are necessary to help businesses comply with the complexities associated with a local lax imposed within limited geographic subset areas of the State.

The fiscal note to the proposed rule states that state governments around the country typically recoup their expenses associated with the administration of local sales taxes through the

---

[2] On April 17, 2013, the Legislature passed Senate Bill No. 1001, which authorized the Monongalia County Commission to levy a special district excise tax for the benefit of the University Town Centre Economic Opportunity District.

[3] Currently no special district excise tax is levied by a municipality pursuant to W. Va. Code § 8-38-9.

imposition of a fee against the gross proceeds of the local tax collected; and if such fees were not imposed, state taxpayers would need to subsidize the additional administrative costs through additional state allocated resources for tax administration. The fiscal note explains that due to economies of scale, smaller states, such as West Virginia, must impose a larger fee to fully recoup administrative costs of collecting local sales taxes than do larger states.

The fiscal note additionally explains that each implementation of a local sales tax requires substantial up-front expenditures that the State Tax Department incurs prior to any local sales tax revenue being collected against which a retainage fee can be applied and that the proposed rule provides for the recovery of the up-front implementation costs and the administration costs over time. The fiscal note does not describe these "substantial up-front expenditures" or explain how they are computed.

The fiscal note indicates that in the fiscal year ending June 30, 2013, there was no increase in administrative costs and no increase in fee revenues. The fiscal note projects that for the fiscal year ending June 30, 2014, costs of administration will increase by $300,000 and that revenue from the fee is estimated to be $440,000.00. The fiscal note does not disclose whether these amounts are for administration, collection and enforcement of sales and use taxes imposed by all six municipalities that impose sales and use taxes or just the three municipalities for which taxes will be collected beginning October 1, 2013. Similarly, the fiscal note does not explain whether the estimated fee revenue represents fees charged for six municipalities or three municipalities. Finally, the fiscal note estimates that once Senate Bill No. 435 is fully implemented, the estimated total costs of administration will be $1 million and that total estimated revenues from the fee will be $1 million. Again, the fiscal note does not disclose the number of municipalities on whose behalf the costs will be incurred.

The fiscal note breaks down the additional administrative costs as follows:

	FY 2014	Annual Cost Upon Full Implementation
Personal Services	$ 70,000	$700,000
Current Expenses	$ 30,000	$100,000
Other	$200,000	$200,000
Total	$440,000	$1 million

However, aside from the general categorization of expenses, as between personal services, current expenses and other, no other information is provided explaining in any kind of detail what these numbers represent or how they were computed. If the numbers for FY 2014 are based on beginning to collect tax for the municipalities of Charleston, Quinwood and Wheeling as of October 1, 2013, what are the imbedded expenses in the Department's FY 2014 budget for administration, collection and enforcement of the sales and use taxes currently being collected for the municipalities of Huntington, Rupert and Williamstown? The assumptions made to prepare the estimate of costs and revenues once SB 435 is fully implemented are neither identified nor explained. The fiscal note appears to assume that once SB 435 is fully implemented, 20 municipalities will participate in the Municipal Home Rule Pilot Project and that all 20 will impose sales and use taxes pursuant to W. Va. Code § 8-1-5a. The fiscal note

appears to ignore the fact that approximately 117 West Virginia municipalities do not impose a business and occupation tax and that these municipalities do not need the approval of the Municipal Home Rule Board to impose sales and use taxes pursuant to W. Va. Code §§ 8-13C-4(b) and 8-13C-5(b). Presently, three of these 117 municipalities impose sales and use taxes – Quinwood, Rupert and Williamstown. The fiscal note may be assuming that only the larger municipalities will want to impose sales and use taxes. That will not necessarily be the case, however, as evidenced by the populations of Quinwood, Rupert and Williamstown. The 2010 census report discloses that the populations of these municipalities were:

Quinwood – 290 persons
Rupert – 942 persons
Williamstown – 2,908 persons

B. Specific Comments

1. **Proposed § 110-28-1.1.a.**

Proposed § 110-28-1.1.a. provides that "The Legislature has determined that the preeminent interest of all municipal consumers sales and service tax and use tax jurisdictions is best served by empowerment of the Tax Commissioner, by law, to hold, maintain and exercise sole authority to administer the municipal consumers sales and service tax and use tax."

Comment: The reality, however, is that in 2003, the Legislature enacted the "Main Street Fairness Act of 2003," H. B. 3014, and determined that it was in the interest of the State of West Virginia to sign the Streamlined Sales and Use Tax Agreement[4] and to be a full participating member of the Streamlined Sales and Use Tax Project. *See* W. Va. Code §§ 11-15B-3(a) and 11-15B-5(a). Later that year, during the second extraordinary session, Senate Bill No. 2010 was enacted which added to the Code § 11-15B-33 (state administration of local sales and use taxes), § 11-15B-34 (state and local sales and use tax bases), § 11-15B-35 (local rate and boundary changes) and § 11-15B-36 (relief from certain liability for state and local taxes).

In 2004, the Legislature enacted W. Va. Code § 8-13C-1 *et seq.* Sections 8-13C-4(a) and 8-13C-5(a) allow municipalities with a severely underfund policeman's or fireman's pension plan to impose pension relief sales and use taxes. Other municipalities were authorized to impose alternative sales and use taxes, W. Va. Code §§ 8-13C-4(b) and 8-13C-5(b) provided the municipality eliminated its business and occupation tax. Consistent with requirements of W. Va. Code § 11-15B-1 *et seq.*, the sales and use taxes imposed pursuant to W. Va. Code §§ 8-13C-4 and 8-13C-5 must be administered, collected and enforced by the State Tax Commissioner.

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[4] W. Va. Code § 11-15B-2a. Streamlined Sales and Use Tax Agreement defined.

"As used in this article and articles fifteen and fifteen-a of this chapter, the term "Streamlined Sales and Use Tax Agreement" or "agreement" means the agreement adopted November 12, 2002, by states that enacted authority to engage in multistate discussions similar to that provided in section four of this article, except when the context in which the term is used clearly indicates that a different meaning is intended by the Legislature. "Agreement" includes amendments to the agreement adopted by the implementing states in calendar years 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011 and amendments adopted by the governing board on or before, January 31, 2012, but does not include any substantive changes in the agreement adopted after January 31, 2012."

The Streamlined Sales Tax Project came into being because 46 states and over 7,000 local jurisdictions impose sales and use taxes. Tax bases are varied, due dates of returns vary, rate and boundary changes are frequent and large national retailers are theoretically subject of audit by each of these jurisdictions. One objective of Project was to streamline administration and compliance for all retailers. The Streamlined Sales and Use Tax Agreement and W. Va. Code § 11-15B-1 *et seq.* addresses these concerns by limiting the number of returns to be filed to one per state, to be filed no more frequently than once per month and no sooner than the 20th day of the month following the month in which tax is collected, limiting the effective dates of tax rate and boundary changes for tax collection purposes to four times per year, with any changes to apply on the first day of a calendar quarter and for there to be one compliance audit per state, whether performed by the state or a designee of the state.

One of the requirements of the Streamlined Sales and Use Tax Agreement is that there is state level administration of local sales and use taxes. Section 301: STATE LEVEL ADMINISTRATION, of the Agreement reads:

> A. Each member state shall provide state level administration of sales and use taxes subject to the Agreement. The state level administration may be performed by a member state's Tax Commission, Department of Revenue, or any other single entity designated by state law. Sellers and purchasers are only required to register with, file returns with, and remit funds to the state level authority. The state level authority of a member state shall provide for collection of any local taxes and distribution of them to the appropriate taxing jurisdictions. The state level authority shall conduct, or others may be authorized to conduct on its behalf, subject to the provisions of subsection B, all audits of the sellers and purchasers for that state's tax and the tax of its local jurisdictions. Except as provided herein, local jurisdictions shall not conduct independent sales or use tax audits of sellers and purchasers.
>
> B. If authorized by its state law, nothing in this section prohibits the state level authority from authorizing audits of taxpayers to be conducted or performed by others on behalf of the state level authority so long as: (1) the person is conducting the audit for all taxes due and not just for taxes due to a specific local taxing jurisdiction, (2) the person is subject to the same confidentiality provisions (and other protections afforded to a taxpayer) as a person working for the state level authority, (3) absent fraud, a refund claim filed subsequent to the audit that covers part of the audit period or mutual consent, the audit does not cover an audit period already conducted by the state level authority or another person acting on its behalf and (4) the audit is subject to the same administrative and appeal procedures granted to audits conducted by the state level authority.

(Emphasis added.)

West Virginia has implemented Section 301 of the Agreement by enacting W. Va. Code § 11-15B-33, which reads:

> **§11-15B-33. State administration of local sales and use taxes.**
>
> The Tax Commissioner shall administer, or authorize others to conduct on his or her behalf, the sales and use tax laws of this state subject to the agreement. Sellers and purchasers are only required to register with, file returns with and remit funds to the Tax Commissioner. The Tax Commissioner shall collect any municipal sales and use taxes and distribute them to the appropriate taxing jurisdictions. The Tax Commissioner shall conduct, or others may be authorized to conduct on his or her behalf, all audits of sellers and purchasers for compliance with the sales and use tax laws of this state and the sales and use tax laws of its local jurisdictions. Except as provided herein, local jurisdictions may not conduct independent sales or use tax audits of sellers and purchasers.

Section 302 of the Agreement requires that state and local jurisdiction in a state use the same tax base, with limited exception, and the same definitions. Section 302: STATE AND LOCAL TAX BASES of the Agreement reads:

> The tax base for local jurisdictions shall be identical to the state tax base unless otherwise prohibited by federal law. This section does not apply to sales or use taxes levied on fuel used to power motor vehicles, aircraft, locomotives, or watercraft, or to electricity, piped natural or artificial gas or other fuels delivered by the seller and the retail sale or transfer of motor vehicles, aircraft, watercraft, modular homes, manufactured homes, or mobile homes.

West Virginia has implemented Section 302 of the Agreement by enacting W. Va. Code § 11-15B-34, which reads:

> **§11-15B-34. State and local sales and use tax bases.**
>
> (a) *General.* -- The tax base of a local jurisdiction that levies a local sales or use tax pursuant to authority granted by the Legislature shall be identical to the sales and use tax base of this state, unless otherwise prohibited by federal law, except as provided in subsection (b) of this section.
>
> (b) *Exceptions.* – This section does not apply to sales or use taxes levied on: (1) The wholesale sale of gasoline or special fuel to power motor vehicles, aircraft, locomotives, or watercraft or to electricity, piped natural or artificial gas or other fuels delivered by the seller, which local jurisdictions are prohibited from taxing; or (2) the retail sale or transfer of

motor vehicles, aircraft, watercraft, modular homes, manufactured homes or mobile homes.

Another requirement of the Agreement is that local tax rate and boundary changes may not exceed four per year per local jurisdiction, and for tax purposes all changes are effective on the first day of the calendar quarter that begins at least 60 days after vendors are notified of the change. There is a special rule notification rule for catalogue sales. Section 305: LOCAL RATE AND BOUNDARY CHANGES of the Agreement reads:

> Each member state that has local jurisdictions that levy a sales or use tax shall:
>
> A. Provide that local rate changes will be effective only on the first day of a calendar quarter after a minimum of sixty days' notice to sellers.
>
> B. Apply local sales tax rate changes to purchases from printed catalogs wherein the purchaser computed the tax based upon local tax rates published in the catalog only on the first day of a calendar quarter after a minimum of one hundred twenty days' notice to sellers.
>
> C. For sales and use tax purposes only, apply local jurisdiction boundary changes only on the first day of a calendar quarter after a minimum of sixty days' notice to sellers.
>
> D. Provide and maintain a database that describes boundary changes for all taxing jurisdictions. This database shall include a description of the change and the effective date of the change for sales and use tax purposes.
>
> E. Provide and maintain a database of all sales and use tax rates for all of the jurisdictions levying taxes within the state. For the identification of states, counties, cities, and parishes, codes corresponding to the rates must be provided according to Federal Information Processing Standards (FIPS) as developed by the National Institute of Standards and Technology. For the identification of all other jurisdictions, codes corresponding to the rates must be in the format determined by the governing board.

West Virginia has implemented Section 305 of the Agreement by enacting W. Va. Code § 11-15B-35, which reads, in relevant part:

> **§11-15B-35. Local rate and boundary changes.**
>
> (a) *General.* -- Local tax rate changes shall be effective only on the first day of a calendar quarter after a minimum of sixty days' notice to the sellers, except as provided in subsection (b) of this section.

(b) *Printed catalogs.* -- Local tax rate changes shall apply to purchases from printed catalogs where the purchaser computed the tax based upon the local tax rate published in the catalog only on and after the first day of a calendar quarter after a minimum of one hundred twenty days' notice to the sellers.

(c) *Local boundary changes.* -- A local jurisdiction boundary change shall first apply for purposes of computation of a local sales and use tax on the first day of a calendar quarter after a minimum of sixty days' notice to sellers.

(d) *Database of local jurisdiction boundaries.* --

(1) The state shall provide and maintain a database that describes boundary changes for all taxing jurisdictions. This database shall include a description of the change and the effective date of the change for sales and use tax purposes.

(2) The state shall provide and maintain a database of all sales and use tax rates for all of the jurisdictions levying taxes within the state. For the identification of states, counties and cities, codes corresponding to the rates must be provided according to federal information processing standards (FIPS) as developed by the National Institute of Standards and Technology. For the identification of all other jurisdictions, codes corresponding to the rates must be in the format determined by the governing board.

(3) The state shall provide and maintain a database that assigns each five-digit and nine-digit zip code within the state to the proper tax rates and jurisdictions. The state must apply the lowest combined tax rate imposed in the zip code area if the area includes more than one tax rate in any level of taxing jurisdictions. If a nine-digit zip code designation is not available for a street address or if a seller or certified service provider is unable to determine the nine-digit zip code designation applicable to a purchase after exercising due diligence to determine the designation, the seller or certified service provider may apply the rate for the five-digit zip code area. For the purposes of this section, there is a rebuttable presumption that a seller or certified service provider has exercised due diligence if the seller has attempted to determine the nine-digit zip code designation by utilizing software approved by the governing board that makes this designation from the street address and the five-digit zip code applicable to a purchase.

[(4) and (5) omitted.]

2. **Proposed Section 110-28-1.2. – Authority [for rule]. – No comment.**

3. **Proposed Section 110-28-3. -- Tax Base.**

Comment: Commonality of state and local tax bases, with certain exceptions, is required by W. Va. Code § 11-15B-34 (state and local sales and use tax bases) and by W. Va. Code §§ 8-13C-4(c) and 8-13C-5 (uniformity of tax base).

Three exceptions to uniformity of tax base are provided in subdivisions 3.1.a, 3.1.b, and 3.1.c. However, this is not an exhaustive list of the exceptions.

We suggest adding a fourth exception for transactions subject to state sales tax but exempt from local sales taxes pursuant to federal law. For example, Section 602(a) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 at 144, exempts from local tax providers of direct-to-home satellite service. Section 602(a) reads:

> (a) PREEMPTION- A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.

The term "local taxing Jurisdiction" is defined in Section 602(b)(3) and means "any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State."

The terms "tax" and "fee" are defined in Section 602(b)(5) and mean "any local sales tax, local use tax, local intangible tax, local income tax, business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise fees, local telecommunications tax, or any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction."

4. **Proposed Section 110-28-4. -- Administration and Collection of Tax.**

Proposed Subsection 110-28-4,1. – No comment.

Proposed Subsection 110-28-4.2. – No comment.

Proposed Subsection 110-28-4.3. makes reference to W. Va. Code § 7-18-1 in two places both in the context of a special district excise tax. The taxes imposed pursuant to W. Va. Code § 17-18-1 *et seq.* are hotel occupancy taxes.

Comment: The correct statutory reference for special district excise taxes imposed by county commissions is W. Va. Code § 7-22-1 *et seq.*

Proposed Subsection 110-28-4.4. – No comment.

Proposed Subsection 110-28-4.5. – No comment.

Proposed Subsection 110-28-4.6. – Exception to Collection Requirements.

Subsection 110-28-4.6 reads: "Notwithstanding Sections 4.4 and 4.5 of these rules, no municipal sales and service tax and municipal use tax need be collected by the vendor or retailer with respect to a transaction if the state consumers sales and service and use tax need not be collected under the provisions of the consumers sales and service and use tax, as if such provisions were set forth herein in extenso."

Comment: We suggest striking out the word "need" in two places and replacing it in both places with the word "shall." Simply put, vendors do not have discretion over whether they do or do not collect state consumers sales and use taxes, and they should not have discretion over whether to collect municipal sales and use taxes.

Proposed Section 110-28-4.7. – No comment.

Proposed Subsection 110-28-4.8 reads:

> 4.8. To the extent that they may be reasonably subject to computation, the Tax Commissioner may annually issue an Administrative Notice, to be published on or before the first day of June of each year in the State Register, setting forth projections or determinations of:
>
> 4.8.a. The projected beginning and ending balances of the accumulated cost account for the fiscal year beginning 30 days after the June 1 issuance date, and
>
> 4.8.b. the projected offsets and adjustments to the accumulated cost account projected for such fiscal year (principally the projected periodic cost recovery fee), and
>
> 4.8.c. The reconciliation adjustment that will be applied to determine allocable revenues in such fiscal year.
>
> 4.8.d. Tax Department's projection of the amount of the periodic cost recovery fee that will be applied against net tax revenues during such fiscal year.
>
> 4.8.e. The projected amount of total allocable revenues such fiscal year, and
>
> 4.8.f. At the sole discretion of the Tax Commissioner, projected allocable revenues to be distributed to each separate revenue generating municipality, on annual or other periodic basis, as the Tax Commissioner may determine, in such fiscal year, and

4.8.g. Such other data and information as the Tax Commissioner may elect to include.

Comment 1: While filing documents in the State Register is deemed to be public notice, W. Va. Code § 29A-2-4,[5] there are systemic problems with the State Register that often result in this notice not being effective notice. First, depending upon whether the Secretary of State decides to publish two 8.5" x 11" pages on one page of the State Register, in landscape, it becomes difficult or impossible to read the text of what is on that page in the State Register. Now that the State Register is available only in electronic format, there is no justifiable reason for the Secretary of State to not publish each page of a document filed in the State Register on a separate page of the State Register and to upgrade the scanner used, if necessary, so that documents included in the Register can be read.

Second, the Secretary of State has historically included in the State Register only the "cover page" of a document filed in the State Register. For example, only the notice page for this proposed rule was published in the Volume XXX, Issue 26, State Register published June 28, 2013, at page 1148. Another example is that on June 27, 2013, the Tax Commissioner filed in the State Register, for public comment, a 47-page document providing tentative natural resource property valuation variable for the 2014 tax year developed by the Department for use in appraising coal, oil, natural gas, managed timberland and other natural resource properties for ad valorem property tax purposes. The public comment period closes August 1, 2013. The Secretary of State published in Volume XXX, Issue 27, State Register published July 5, 2013, at page 1204, only the transmittal letter. The remaining 46 pages have not been published in the State Register, and the 47-page document is not available at the Secretary of State's website.

When the State Register was printed and distributed, there were justifiable concerns about the size and cost of publishing and mailing the State Register. Because today the State Register is available only in electronic format, the entire document filed in the State Register should be included in the electronic State Register.

Comment 2: Subsection 110-28-4.8 is not mandatory and, should such an administrative notice be published, it need only include the information specified in that subsection to the extent that it may be reasonably subject to computation. The phrase "reasonably subject to computation" is not defined. Moreover, when local sales and use taxes are administered, collected and enforced by the Tax Commissioner, whether for 6, 20, 23 or more municipalities, many of the costs incurred will be for the administration, collection and enforcement of state consumers sales and use taxes as well as frequently for more than one municipality. The proposed rule is silent on how these costs will be allocated first as between the State and the municipalities and second as between the municipalities.

For example, the legislative rule for the state consumers sales and use taxes has not been amended for more than 20 years notwithstanding the fact that during that period the consumers

[5] W. Va. Code § 29A-2-4. Contents of state register deemed a public record.

"Every paper filed in the state register shall be a public record provable and admissible as evidence if otherwise relevant, of which judicial notice may be taken, either under lawful certification or by reason of duplication and distribution as a copy of the state register in accordance with this article."

sales and service imposed in W. Va. Code § 11-15-1 *et seq.* and the use tax imposed in W. Va. Code § 11-15A-1 *et seq.* have been amended on numerous occasions. Additionally, W. Va. Code § 11-15B-1-1 *et seq.*, enacted in 2003, applies to both taxes, and that article has also been amended on several occasions. Suppose the Tax Commissioner decides to have his staff rewrite or prepare amendments for W. Va. Code St. R. § 110-15-1 *et seq.* at a cost of $20,000, would that cost be absorbed by the State Tax Department or would the cost be allocated? If the cost is allocated, how would the costs be allocated? The proposed rule provides no guidance. Parenthetically, except to the extent the revision addresses subjects unique to municipal sales and use tax administration and compliance, the cost should be absorbed by the Department and not passed on to the municipalities.

A second example is where the Tax Commissioner audits a business for compliance with the state business franchise tax, corporation net income tax and consumers sales and use taxes, and for compliance with the sales and use tax laws of five municipalities. Assessments are issued for business franchise and corporation net income taxes and for state and local sales and use taxes. The taxpayer litigates the assessments through the Office of Tax Appeals and then the courts of this State. The taxpayer appeals the adverse decision of the Supreme Court of Appeals to the United State Supreme Court which grants certiorari and hears the case. Regardless of how the Supreme Court decides the case, how will the cost of the audits and this expensive litigation be allocated as between the State Tax Department and the municipalities participating in the original audit?

Suppose the sales/use tax issue is such that the Supreme Court's decision affects not only the original participating municipalities but also other municipalities that imposed sales/use taxes at the time the audits were performed, or after the audits were performed, that are affected by the Supreme Court's decision. Will the cost of the litigation be allocated to just the municipalities participating in the audit, or will the costs be allocated in some manner among all municipalities imposing sale taxes that are affected by the decision?

We suggest that the rule include provisions explaining how costs will be allocated as between the State and the municipalities imposing sales and use taxes.

Subsection 110-28-4.9. provides that the Tax Commissioner may elect to issue a notice other than, or in addition to, an Administrative Notice, and may elect to publish the Administrative Notice or any other such notice by means other than, or in addition to, the State Register. We suggest that Subsection 110-28.4.9 be revised to require the Tax Commissioner to mail or electronically send the notice to the mayor or other designee of the municipality.

Subsection 110-28-4.10. provides that the Tax Commissioner may solicit comments or recommendations regarding such projections, determinations and data for a period of approximately 30 days and, in response thereto, may reissue the notice, as amended, on or about the July 1 next succeeding the initial publication date. We suggest that this subdivision be rewritten to make the subdivision mandatory rather than permissive on the part of the Tax Commissioner.

Subsection 110-28-4.11. Defines "periodic cost recovery fee" to mean "an amount retained from municipal consumers sales and service tax and use tax proceeds by the Tax Department to recover those costs reflected and aggregated in the **accumulated cost account**."

"**Accumulated cost account**" is defined in Subsection 110-28-2.1 and means "the total pooled amount of all **implementation costs** and all **operating costs** incurred by the Tax Department on and after the commencement date for **recoverable cost accrual**. The accumulated cost account is added to periodically as costs are incurred. The accumulated cost account is drawn down by the periodic cost recovery fee. After any periodic offset of the accumulated cost account by the periodic cost recovery fee or any other adjustment, any amount remaining in the accumulated cost account carries forward into future periods, and may be further offset from time to time as the periodic cost recovery fee is applied in succeeding periods.

"**Implementation cost**" is defined in Subsection 110-28-2.5 and means "the total aggregate cost incurred by the Tax Department for initial implementation of tax administration for, or related to, all program municipalities. Implementation cost includes, but is not limited to, the initial costs incurred by the Tax Department to: hire and train personnel, configure record keeping systems, design forms, configure remittance processing systems and auditing and verification processes, implement and test computer programming, build and input municipal mapping and boundaries databases and zip code databases and configure and set up systems for distribution of revenues to each municipal taxing jurisdiction, and undertake other necessary costs to set up an administration system for collecting and distributing allocable revenues derived from municipal consumers sales and service tax and use tax revenues for program municipalities.

"**Operating cost**" is defined in Subsection 110-28-2.8 and means "the total aggregate cost incurred by the Tax Department for direct and indirect ongoing costs incurred to administer taxes imposed pursuant to the authority of W. Va. Code § 8-1-5a (Home Rule Pilot Plan) or W. Va. Code § 8-13C-1 *et seq.* (Municipal sales tax), for, or related to, all program municipalities. Operating cost includes, but is not limited to, costs of day to day operations for processing and verifying tax returns and remittances, verifying and issuing tax refunds, processing and correcting filing and payment errors, calculating and issuing periodic distributions of tax revenues back to revenue generating municipalities, administering the interface between the State and Streamlined sales and use tax administrators for municipal consumers sales and service tax and use tax, administering rate changes, changes and updates to municipal boundaries and changes and updates to the vendor database for program municipalities."

Comment: We note that the term "recoverable cost accrual" as used in the definition of "accumulated cost account" appears be an undefined term. We suggest that this term be defined.

Additionally, while we do not see a problem with the terms as defined in Subsection 110-28-4.11, the devil will be in the detail of their application particularly when a particular task is attributable to state sales tax administration and to municipal sales tax administration on behalf of or more municipalities. For example, will Tax Department employees be keeping time sheets on which time is recorded in five minute intervals, the service provided is identified and the

jurisdiction(s) for which the service was provided are identified? It appears that the Department is creating for itself a cost accounting nightmare.

Subdivision 110-28-4.11.a. provides that instead of applying the periodic cost recovery fee to offset net tax revenues in a given period, the Tax Department may, at the election of the Tax Commissioner, apply a projected **periodic cost recovery fee** against **net tax revenues** for a given period and then may add or subtract a **reconciliation adjustment** to net tax revenues for the next succeeding period, to reconcile the difference between the projected periodic cost recovery fee as applied in that previous period and the periodic cost recovery fee actually attributable to that previous period.

"**Periodic cost recovery fee**" is defined in Subdivision 110-28-2.10 and means "the lesser of: (a) the total balance in the accumulated cost account; or (b) 5% of net tax revenues for the period."

"**Net tax revenues**" is defined in Subsection 110-28-2.7. and means "the total pooled amount of all revenues under the provisions, as applicable, of W. Va. Code § 8-l-5a (Home Rule Pilot Plan) or W. Va. Code § 8-l3C-l *et seq.* (Municipal sales tax), of all revenue generating municipalities, for the period, net of refunds and net of adjustments for filing errors, payment errors, and similar adjustments for the period, and after application of the reconciliation adjustment for the period, but before offset by the periodic cost recovery fee."

"**Reconciliation adjustment**" is defined in Subsection 110-28-2.12 and means the "adjustment for the variance between the amount of the projected periodic cost recovery fee applied in a fiscal year versus the periodic cost recovery fee actually calculated for the fiscal year. The adjustment is the amount to be added to net tax revenues or subtracted from net tax revenues (among other adjustments) to determine allocable revenues." *See* discussion in Section 110-28-4.1.1.

"**Revenue generating municipalities**" is defined in Subsection 110-28-2.13. and means "those municipalities that have generated tax revenues for the period under the provisions, as applicable, of W. Va. Code § 8-l-5a (Home Rule Pilot Plan) or W. Va. Code § 8-l3C-1 *et seq.* (Municipal sales tax), net of refunds and net of adjustments for filing errors, payment errors, and similar adjustments for the period, but before offset by the periodic cost recovery fee and before application of the reconciliation adjustment for the period."

"**Period,**" "**the period**" or "**periodic**" are defined in Subsection 110-28-2.9 and collectively mean and refer to "the tax period or accounting period, applicable in the context of the usage of the term, and may refer to a monthly, quarterly, semi-annual or annual time period, or such other time period as may be prescribed by the Tax Commissioner."

Comment: Due to the complexity of the rule and the difficulties the State Tax Department is likely to have when allocating costs among multiple jurisdictions, we suspect that the periodic recovery fee will likely always be five percent of net sales and use tax revenues collected for the municipalities. We believe, however, this is not what the Legislators intended when it enacted H. B. 105 on April 18, 2013.

5. **Proposed Section 110-28-5 – Remittance of Tax.**

Proposed Section 110-28-5 reads:

5.1. No profit shall accrue to any person as a result of the collection of the municipal sales and service tax regardless of the fact that the total amount of such taxes collected may be in excess of the amount for which such person would be liable by the application of the levy set forth by the municipality, not to exceed one percent, to the gross proceeds of his sales. The total of all municipal sales and service and use taxes collected by any such person shall be retuned and remitted to the Tax Commissioner.

5.2. Any person who is required to collect and remit the consumers sales and service tax or the use tax and who was also required to pay such taxes on purchases of tangible personal property or services for use or consumption in his business may utilize one of the following procedures when paying the municipal sales and service and use tax collected to the Tax Commissioner.

5.2.a. Such person may separately remit the amount collected and pay the amount due and owing on his purchases made using the direct pay permit procedure,

5.2.b. Such person may credit the amount of tax paid on his purchases for which an exemption is claimed against the amount of tax collected and:

5.2.b.1. if the amount collected is greater than the amount of tax paid on his exempt purchases, he shall remit the difference to the Tax Commissioner; or

5.2.b.2. if the amount of tax paid on his exempt purchases is greater than the amount collected, he may seek a refund or credit for the difference as provided in Section 9a of these rules.

5.2.c. A person shall use the same means to collect and remit municipal sales and service and use tax as the person uses to collect and remit the consumers sales and service tax and use tax.

5.3. Sales and Service Tax Return and Payment- Any municipal sales and service and use tax that a person is required to collect and remit to the State Tax Commissioner shall be provided for in the same return that such person is required to file under the consumers sales and service tax and use tax.

Comment 1: We suggest that Section 110-28-5 be revised because as the section is currently written, it appears to apply only to vendors required to collect and remit state consumers sales and use taxes when that is not the totality of the universe of taxpayers required to remit local sales and use taxes. For example, a business may have a municipal use tax liability but not have a state consumers sales or use tax liability because the state tax was previously paid.

Comment 2. Paragraph 110-28-5.2.b.2. refers to a Section 9a of the rule. However, the proposed rule does not include either a Section 9 or a Section 9a.

6. **Proposed Section 110-28-6. – Appeals, Standards and Jurisdiction.**

Comment: The thrust of proposed Section 110-28-6 is that municipalities have absolutely no standing to question or contest the amount of fee the Tax Commissioner annually charges for administration, collection and enforcement of a municipality's sales and use taxes, or to challenge or contest the amount of tax remitted to that municipality. On its face, this is an affront to the notion of fair play. Due to the complexity of this rule regarding computation of the annual fees the Tax Commissioner charges a municipality, we suggest that the proposed rule be revised to require that at least annually, or every six months, the Tax Commissioner shall provide each municipality for which sales and use taxes are collected with written notice of the net revenues collected during the period for which the notice is given and of the costs incurred by the Commissioner during that period to (1) administer, (2) collect and (3) enforce that municipality's sales and use taxes along with a narrative providing a detailed description of the services provided and explaining how the costs were determined. This is particularly desirable when the cost incurred benefitted State consumers sales and use tax collections as well as taxes collected by the Commissioner for two or more municipalities.

Subsection 110-28-6.4 provides that "No municipality or county may engage in or participate in any audit, either performed by the Tax Commissioner or by the municipality or county arising under any local sales and use tax and excise tax."

Comment: While we agree with general proposition set forth in Subsection 110-28-6.4., nothing in Section 301 of the Streamlined Sales and Use Tax Agreement nor W. Va. Code § 11-15B-33 keeps municipalities from asking sales and use tax compliance questions when auditing a taxpayer's books and records of compliance with its municipal business and occupation tax or from auditing a business for compliance with State and local sales and use tax laws provided the audit is done pursuant to a contract between the Tax Commissioner and the municipality and the results of the audit are turned over to the Commissioner for purposes of issuing and assessment.

When the City of Charleston's sales and use tax ordinance was adopted, language was included in Section 111-10 (a) allowing the City and the Tax Commissioner to enter into an agreement allowing the City when auditing a business with a physical location in the City for compliance with its business and occupation tax to also audit for compliance with state and local sales and use tax laws and to share that information with the Tax Commissioner, who after review could use that information to issue an assessment against the business. Subsection (a) reads:

(a) The Tax Commissioner is responsible for administering, collecting and enforcing the taxes imposed by this article as provided in W. Va. Code § 8-13C-6 and § 11-15B-33. The City may enter into an agreement with the Tax Commissioner that will allow employees of the City auditing a vendor with a physical location in the City for compliance with the City's business and occupation tax to also audit that location for compliance with the sales and use tax laws of this State and this City and to share that information with the Tax Commissioner.

This language recognizes that the Tax Commissioner is responsible for administering, collecting and enforcing a large number of state business taxes, tax credits and tax related program, and that the Tax Commissioner has finite amount of audit resources to audit the many in-state and out-of-state businesses doing business in West Virginia. According to the Tax Commissioner's website, the Commissioner has 46 business tax auditor positions and 9 excise tax auditor positions.

We suggest that Subsection 110-28-6.4 be revised to recognize the finite audit resources of the Tax Commissioner and to allow municipalities with an audit staff, pursuant to contract with the Commissioner, to audit for State and local sale and use tax compliance when the municipality is auditing a business for compliance with the municipality's business and occupation tax.

7. **Proposed Section 110-28-7. – Quarterly distribution of collections; Periodic Cost recovery fee; Fund Administration.**

Section 110-28-7.1 pertains to quarterly distributions of taxes, additions to tax, interest and penalties collected for a municipality during the preceding calendar quarter.

Comment: We suggest that consideration be given to distributing collections more frequently than quarterly particularly since larger retailers are required to remit collected tax monthly to the Tax Commissioner by electronic funds transfer and to file electronic returns. If municipalities collected their own sales/use taxes, larger retailers would also be remitting tax monthly to the municipality.

Additionally, we would like to see the Administration in conjunction with the State Treasurer propose legislation specifying when municipalities can anticipate receiving distributions from the State Treasurer after receipt of the Tax Commissioner's requisition on the Treasury. The subject here is not distribution of state funds. Rather, the subject is distribution of funds collected by the Tax Commissioner as agent for the municipalities that impose sales and use taxes.

Subsection 110-28-7.1.a pertains to how municipalities account for the sales and use tax collections, and the Tax Commissioner's fees, etc.

Comment: With all due respect, we believe the subject matter of subsection 110-28-7.1.a comes under the jurisdiction of the State Auditor in his capacity as *ex officio* the chief

inspector and supervisor of public offices pursuant W. Va. Code § 6-9-1 as amended by W. Va. Code § 6-9-11, and should be deleted from the proposed rule.

Subsection 110-28.7.2. – No comments.

Subsection 110-28-7.3. – No comments.

Subsection 110-28-7.4. relating to expenditure of the fees charged pursuant to W. Va. Code § 11-10-11c.

Comment: We suggest that Subsection 110-28-7.4. should be modified to recognize that except as to expenditure of fees collected in FY 2014, the fees collected under the rule may not be expended except in accordance with appropriation by the Legislature, as provided in H. B. 105.

8. **Proposed Section 110-28-8. Notification; Effective Date of tax.**

Subsection 110-28-8.1 provides that "Any jurisdiction that imposes a municipal sales and service and use tax, and any jurisdiction that changes the rate of such tax shall notify the Tax Commissioner at least 180 days before the effective date of the imposition of the taxes or the change in the rate of the taxes. Provided, that such effective date must begin on the July 1 next succeeding 180 days' notice to the Tax Commissioner of the imposition of the taxes or the change in the rate of the taxes. Such notification shall include a certified copy of the ordinance imposing the taxes, or changing the rate in a tax, along with a description of the boundaries of the city, the nine-digit zip codes for addresses located within the boundaries of the city and such other information as the Tax Commissioner may need to administer, collect and enforce the taxes administered under this rule."

Comment: Subsection 110-28-8.1 is contrary to the plain meaning of W. Va. Code § 8-13C-6(a) which provides:

> (a) *Notification to Tax Commissioner.* -- Any municipality that imposes a municipal sales and service tax and a municipal use tax pursuant to this article or changes the rate of the taxes shall notify the Tax Commissioner at least one hundred eighty days before the effective date of the imposition of the taxes or the change in the rate of the taxes.

(Emphasis added.) There is no requirement in W. Va. Code § 8-13C-6(a) that imposition of a local sale/use tax, or change in the rate of a local sales/use tax, be delayed until the first day of July following completion of the 180-day notification period provided in W. Va. Code § 8-13C-6(a). Moreover, the 180-day notification requirement in W. Va. Code § 8-13C-6(a) applies only to sales/use taxes imposed pursuant to W. Va. Code §§ 8-13C-4 and 8-13C-5. It does not apply to sales and use taxes imposed pursuant to W. Va. Code § 8-1-5a.

Parenthetically, the 180-day notification rule was included in Section 8-13C-6(a) because when article 8-13C was enacted in 2004, the state consumers sales and use taxes were being

administered and collected utilizing the State Tax Department's legacy computer system that dated back to the middle 1970s, and utilized programming language that was obsolete in 2004 and which for many years prior to 2004 had not been taught to programmers. The 180-day notification period was intended to give the State Tax Department some lead time to determine how best to administer and collect municipal sales and use taxes should a municipality decide to impose those taxes pursuant to W. Va. Code §§ 8-13C-4 and 8-13C-5.

The State Tax Department's old computer system was recently replaced by a new computer system costing approximately $20 million that utilizes off-the-shelf software. It is much easier today for the State Tax Department to administer and collect municipal sales/use taxes utilizing its new computer system. Moreover, the State Tax Department is already collecting sales and use taxes imposed by the municipalities of Huntington, Rupert and Williamstown. Consequently, the systems are already in place and the State Tax Department has no need to invent the wheel so to speak whenever a municipality decides to impose a sales/use tax.

Additionally, the 180-day rule in Subsection 110-28-8.1. is contrary legislative intent expressed in the provisions of W. Va. Code § 11-15B-35 (local rate and boundary changes), which allows tax rate and boundary changes to occur for tax administration and collection purposes four times per year. Section 11-15B-25 reads:

> (a) *General.* -- Local tax rate changes shall be effective only on the first day of a calendar quarter after a minimum of sixty days' notice to the sellers, except as provided in subsection (b) of this section.
>
> (b) *Printed catalogs.* -- Local tax rate changes shall apply to purchases from printed catalogs where the purchaser computed the tax based upon the local tax rate published in the catalog only on and after the first day of a calendar quarter after a minimum of one hundred twenty days' notice to the sellers.
>
> (c) *Local boundary changes.* -- A local jurisdiction boundary change shall first apply for purposes of computation of a local sales and use tax on the first day of a calendar quarter after a minimum of sixty days' notice to sellers.

Also see the discussion *supra* regarding Section 305 of the Streamlined Sales and Use Tax Agreement and W. Va. Code § 11-15B-35.

Moreover, the Tax Commissioner is currently applying W. Va. Code § 11-15B-35 as it is written. For example, on June 19, 2013, the Wheeling City Council adopted Wheeling's ordinance imposing sales and use taxes pursuant to W. Va. Code § 8-1-5a. The Tax Commissioner will begin collecting Wheeling's taxes on October 1, 2013.

Conclusion

In crafting its sales and use tax ordinance and in its implementation, the City of Charleston and the State Tax Department openly communicated on a number of subjects that facilitated adoption and implementation of the City's sales and use tax ordinance. We look forward to having a continuing dialogue with the State Department regarding administration of the City's sales and use taxes.

We agree that the Tax Commissioner should be allowed to recover his cost of administering, collecting and enforcing Charleston's sales and use taxes. The fee charged should be the actual cost of administration, collection and enforcement, or 5% of net revenues collected for the City of Charleston, whichever is less, with emphasis on the words "whichever is less" provided reasonable, workable methods are in place to determine and allocate those costs. We observe that the proposed rule does not provide for the City of Charleston to pay costs attributable to collection of another jurisdiction's sales and use tax. We agree that this is the appropriate result, and further believe that the rule should specifically so state. The devil is in the detail of how costs are allocated when, for example, a State audit of a business for consumers sale tax compliance is also for compliance with the sales tax ordinances of one municipality, or is also for compliance with the sale tax ordinances of two or more municipalities. We believe the cost recovery methodology set forth in the proposed rule is overly complicated, will require precise record keeping by Tax Department employees and is inadequate because it fails to explain how costs will be allocated when the "expense" incurred is for the State and one municipality, or for the State and more than one municipality. Whatever method is selected by the Tax Commissioner to recover his costs of administering, collecting and enforcing municipal sales and use taxes, we recommend that the Tax Commissioner periodically advise each municipality of the net revenues collected and the costs of collecting those revenues. This should be done at lease annually, if not more frequently, and be provided either in hardcopy or in an electronic document furnished to the mayor or other designee of the municipality. Lastly, we identified a municipal use tax issue that is unique to municipal sales and use tax administration that should be addressed in the rule when it is finalized.

We trust that our comments are helpful and that they will be considered when the proposed rule is finalized for submission to the Legislative Rulemaking Review Committee later this month.

Respectfully submitted July 23, 2013, on behalf the City of Charleston,

By 

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July 23, 2013

Mr. Mark Morton
Department of Tax and Revenue
1001 Lee Street
Charleston, WV 25301

Dear Mr. Morton:

Thank you for the copy of 110CSR28, the proposed Rule Dealing with the Municipal Sales and Service Tax Administration. On behalf of the WV Municipal League, I am commenting on a few items that should be amended before approved.

First, the code section 8-13C-8 you cite throughout the proposed rule dealing with the currently authorized municipal sales and use tax in lieu of B&O for all municipalities appears to be inaccurate. I believe that should be 8-13C-6 or 8-13C-1 et seq.

Second, it was our understanding from the meeting with the Governor that the State would absorb the first year "implementation costs" and begin collecting the administration fee from municipalities once there were actual costs and collections from the cities who were participating. In other words, no up-front implementation cost but an actual table designed on the cost versus collections method once the tax was implemented and collected. That would ensure a true cost established instead of a guestimate followed by a reconciliation of accounts.

Third, 4.8 allows the Tax Commissioner (may) to issue an Administrative Notice. We believe that should be mandatory. We also request the communication to the Municipal League be included along with the State Register. (Also include the Municipal League in 4.9 notices)

Fourth, I don't understand the need for 4.11.a that appears to allow time differentiation in calculations of the costs.

Finally, I don't believe the dates used in the proposed rule (the following July 1) will sync up with the real time dates of approval by the Home Rule Board without penalizing municipalities and delaying the implementation of the municipal sales and use tax. I would suggest you review the dates following the 180 day notice and allow the effective date to be more realistic. If December or January works, look at replacing July 1 with those dates.

Thank you for the opportunity and I hope these comments will be of use to you as you finalize the rule for submission.

Sincerely,

Lisa Dooley, Executive Director

TITLE 110
LEGISLATIVE RULE
TAX DEPARTMENT
SERIES 28
MUNICIPAL SALES AND SERVICE AND USE TAX ADMINISTRATION
RESPONSE TO COMMENTS

Comments from City of Charleston

Comment 1: The Scope of the rule is not accurate and does not fully reflect the historical context of the Streamline Sales and Use Tax Agreement ["SSUTA"] and its requirements.

Response: The agency rejects this comment. While the SSUTA certainly plays a role in the requirement that all sales taxes be administered at the state level, the expertise of the State Tax Department was certainly a consideration in vesting the State Tax Department with the authority to administer all local sales taxes.

Comment 2: Commonality of state and local tax bases, with certain exceptions, is required by W. Va. Code § 11-15B-34 (state and local sales and use tax bases) and by W. Va. Code §§ 8-13C-4(c) and 8-13C-5 (uniformity of tax base).

Three exceptions to uniformity of tax base are provided in subdivisions 3.1.a, 3.1.b, and 3.1.c. However, this is not an exhaustive list of the exceptions.

We suggest adding a fourth exception for transactions subject to state sales tax but exempt from local sales taxes pursuant to federal law. For example, Section 602(a) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 at 144, exempts from local tax providers of direct-to-home satellite service. Section 602(a) reads:

> (a) PREEMPTION- A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.

The term "local taxing Jurisdiction" is defined in Section 602(b)(3) and means "any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State." The terms "tax" and "fee" are defined in Section 602(b)(5) and mean "any local sales tax, local use tax, local intangible tax, local income tax, business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise fees, local telecommunications tax, or any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction."

Response: The agency accepts this comment in part. Providing an exhaustive list of exceptions to the tax base is difficult and unmanageable. However, the agency has added 3.1.d. to the rule as a catch-all providing an exception for any other exemption to the municipal sales and service and use tax when provided by law.

Comment 3: Proposed Subsection 110-28-4.3. makes reference to W. Va. Code § 7-18-1 in two places both in the context of a special district excise tax. The taxes imposed pursuant to W. Va. Code § 7-18-1 et seq. are hotel occupancy taxes. The correct statutory reference for special district excise taxes imposed by county commissions is W. Va. Code § 7-22-1 et seq.

Response: The agency accepts this comment. The rule has been changed to correct all such incorrect cross-references to the special district excise tax.

Comment 4: Subsection 110-28-4.6 reads: "Notwithstanding Sections 4.4 and 4.5 of these rules, no municipal sales and service tax and municipal use tax need be collected by the vendor or retailer with respect to a transaction if the state consumers sales and service and use tax need not be collected under the provisions of the consumers sales and service and use tax, as if such provisions were set forth herein in extenso."

We suggest striking out the word "need" in two places and replacing it in both places with the word "shall." Simply put, vendors do not have discretion over whether they do or do not collect state consumers sales and use taxes, and they should not have discretion over whether to collect municipal sales and use taxes.

Response: The agency rejects this comment. The provision is an exception to the collection requirement when the tax does not need to be collected, and the term "shall" would prohibit vendor from collecting the tax when the liability for the tax may be in question.

Comment 5: While filing documents in the State Register is deemed to be public notice, W. Va. Code §29A-2-4,5 there are systemic problems with the State Register that often result in this notice not being effective notice. First, depending upon whether the Secretary of State decides to publish two 8.5" x 11" pages on one page of the State Register, in landscape, it becomes difficult or impossible to read the text of what is on that page in the State Register.

Now that the State Register is available only in electronic format, there is no justifiable reason for the Secretary of State to not publish each page of a document filed in the State Register on a separate page of the State Register and to upgrade the scanner used, if necessary, so that documents included in the Register can be read.

Second, the Secretary of State has historically included in the State Register only the "cover page" of a document filed in the State Register. For example, only the notice page for this proposed rule was published in the Volume XXX, Issue 26, State Register published June 28, 2013, at page 1148. Another example is that on June 27, 2013, the

Tax Commissioner filed in the State Register, for public comment, a 47-page document providing tentative natural resource property valuation variable for the 2014 tax year developed by the Department for use in appraising coal, oil, natural gas, managed timberland and other natural resource properties for ad valorem property tax purposes. The public comment period closes August 1, 2013. The Secretary of State published in Volume XXX, Issue 27, State Register published July 5, 2013, at page 1204, only the transmittal letter. The remaining 46 pages have not been published in the State Register, and the 47-page document is not available at the Secretary of State's website.

When the State Register was printed and distributed, there were justifiable concerns about the size and cost of publishing and mailing the State Register. Because today the State Register is available only in electronic format, the entire document filed in the State Register should be included in the electronic State Register.

Response: The agency rejects this comment. The State Register is a public record of all public filings of every state agency. Under W.Va. Code §29A-2-3, the State Register shall include:

> Such other material related to administrative procedures and **actions as an agency may desire to make a public record** or the Secretary of State may deem appropriate, or where required by law.

W.Va. Code §29A-2-3(f) [Emphasis added.] Therefore, the State Register is the appropriate destination for the notice required by the rule.

Additionally, this comment seems more appropriately pointed to the Secretary of State and the way they choose to publish these public records, and not to the State Tax Department when making their determinations public.

Comment 6: Subsection 110-28-4.8 is not mandatory and, should such an administrative
notice be published, it need only include the information specified in that subsection to the extent that it may be reasonably subject to computation. The phrase "reasonably subject to computation" is not defined.

Answer: The agency rejects this comment. The agency declines to provide a definition of the phrase "reasonably subject to computation."

Comment 7: When local sales and use taxes are administered, collected and enforced by the Tax Commissioner, whether for 6, 20, 23 or more municipalities, many of the costs incurred will be for the administration, collection and enforcement of state consumers sales and use taxes as well as frequently for more than one municipality.

The proposed rule is silent on how these costs will be allocated first as between the State and the municipalities and second as between the municipalities.

* * *

We suggest that the rule include provisions explaining how costs will be allocated as between the State and the municipalities imposing sales and use taxes.

Answer: The agency rejects this comment. It is plainly clear from the definitions of "Implementation cost", "Net tax revenues", "Operating cost", and "Program municipalities" that the Tax Department intends to aggregate the cost of administration between all municipalities and reduce net tax revenues by the total balance in the accumulated cost account or by 5% of the net tax revenues. It is equally clear the Tax Department intends to then allocate the cost to the municipality through a simple formula:

$$\frac{Municipalities\ allocation\ numerator}{Net\ tax\ revenues}\ x\ Allocable\ revenues$$

The Tax Department declines to allocate revenue between municipalities by any other method.

Additionally, the Tax Department declines to provide line by line detail in this rule as to how it will allocate various resources between the Tax Department and the Program municipalities.

Comment 8: Subsection 110-28-4.9. provides that the Tax Commissioner may elect to issue a notice other than, or in addition to, an Administrative Notice, and may elect to publish the Administrative Notice or any other such notice by means other than, or in addition to, the State Register. We suggest that Subsection 110-28.4.9 be revised to require the Tax Commissioner to mail or electronically send the notice to the mayor or other designee of the municipality.

Answer: The agency rejects this comment. The Tax Department believes the permissive nature of this provision would allow the Tax Department to send notice to the designee of each municipality without the need to require it in the rule. The Tax Department declines to require that notice be sent.

Comment 9: Subsection 110-28-4.10. provides that the Tax Commissioner may solicit comments or recommendations regarding such projections, determinations and data for a period of approximately 30 days and, in response thereto, may reissue the notice, as amended, on or about the July 1 next succeeding the initial publication date. We suggest that this subdivision be rewritten to make the subdivision mandatory rather than permissive on the part of the Tax Commissioner.

Answer: The agency rejects this comment. H.B. 105 (First Special Session 2013) requires no notice of costs. The Tax Department believes that the permissive nature of this requirement is sufficiently protective of the municipalities with interest in the cost projections of the State Tax Department.

Comment 10: We note that the term "recoverable cost accrual" as used in the definition of "accumulated cost account" appears be an undefined term. We suggest that this term be defined.

Answer: The agency rejects this comment. 7.2. of this rule provides clearly that "Recoverable cost accrual shall commence on the effective date of Senate Bill 435, enacted during the Regular Legislative Session of 2013." All other information necessary to determine the amount of recoverable costs are contained within the definitions already provided. No other information about the term is necessary.

Comment 11: Due to the complexity of the rule and the difficulties the State Tax Department is likely to have when allocating costs among multiple jurisdictions, we suspect that the periodic recovery fee will likely always be five percent of net sales and use tax revenues collected for the municipalities. We believe, however, this is not what the Legislators intended when it enacted H. B. 105 on April 18, 2013.

Answer: The agency rejects this comment. It is clear from the definitions provided in the rule that the Tax Department will only assess a fee on actual costs, and the actual amount of the fee will vary depending on the cost. The only reference to 5% in the rule is the cap on the amount the fee can be in any given period.

Comment 12: We suggest that Section 110-28-5 be revised because as the section is currently written, it appears to apply only to vendors required to collect and remit state consumers sales and use taxes when that is not the totality of the universe of taxpayers required to remit local sales and use taxes. For example, a business may have a municipal use tax liability but not have a state consumers sales or use tax liability because the state tax was previously paid.

Answer: The agency accepts this comment. The Tax Department has added subsection 5.4. to apply to any taxpayer that has a municipal use tax liability, but does not have a state tax liability.

Comment 13: Paragraph 110-28-5.2.b.2. refers to a Section 9a of the rule. However, the proposed rule does not include either a Section 9 or a Section 9a.

Answer: The agency accepts this comment. The section has been revised to eliminate the incorrect cross-reference.

Comment 14: The thrust of proposed Section 110-28-6 is that municipalities have absolutely no standing to question or contest the amount of fee the Tax Commissioner annually charges for administration, collection and enforcement of a municipality's sales and use taxes, or to challenge or contest the amount of tax remitted to that municipality. On its face, this is an affront to the notion of fair play. Due to the complexity of this rule regarding computation of the annual fees the Tax Commissioner charges a municipality, we suggest that the proposed rule be revised to require that at least annually, or every six months, the Tax Commissioner shall provide each municipality for which sales and

use taxes are collected with written notice of the net revenues collected during the period for which the notice is given and of the costs incurred by the Commissioner during that period to (1) administer, (2) collect and (3) enforce that municipality's sales and use taxes along with a narrative providing a detailed description of the services provided and explaining how the costs were determined. This is particularly desirable when the cost incurred benefitted State consumers sales and use tax collections as well as taxes collected by the Commissioner for two or more municipalities.

Answer: The agency rejects this comment. The rule provides for a notice of annual projected costs as well as a reconciliation adjustment for any change in the costs actually accrued. This is sufficient protection.

Comment 15: While we agree with general proposition set forth in Subsection 110-28-6.4., nothing in Section 301 of the Streamlined Sales and Use Tax Agreement nor W. Va. Code §11- 15B-33 keeps municipalities from asking sales and use tax compliance questions when auditing a taxpayer's books and records of compliance with its municipal business and occupation tax or from auditing a business for compliance with State and local sales and use tax laws provided the audit is done pursuant to a contract between the Tax Commissioner and the municipality and the results of the audit are turned over to the Commissioner for purposes of issuing and assessment.

When the City of Charleston's sales and use tax ordinance was adopted, language was included in Section 111-10 (a) allowing the City and the Tax Commissioner to enter into an agreement allowing the City when auditing a business with a physical location in the City for compliance with its business and occupation tax to also audit for compliance with state and local sales and use tax laws and to share that information with the Tax Commissioner, who after review could use that information to issue an assessment against the business. Subsection (a) reads:

> (a) The Tax Commissioner is responsible for administering, collecting and enforcing the taxes imposed by this article as provided in W. Va. Code § 8-13C-6 and § 11-15B-33. The City may enter into an agreement with the Tax Commissioner that will allow employees of the City auditing a vendor with a physical location in the City for compliance with the City's business andoccupation tax to also audit that location for compliance with the sales and use tax laws of this State and this City and to share that information with the Tax Commissioner.

This language recognizes that the Tax Commissioner is responsible for administering, collecting and enforcing a large number of state business taxes, tax credits and tax related program, and that the Tax Commissioner has finite amount of audit resources to audit the many in-state and out-of-state businesses doing business in West Virginia. According to the Tax Commissioner's website, the Commissioner has 46 business tax auditor positions and 9 excise tax auditor positions.

We suggest that Subsection 110-28-6.4 be revised to recognize the finite audit resources of the Tax Commissioner and to allow municipalities with an audit staff,

pursuant to contract with the Commissioner, to audit for State and local sale and use tax compliance when the municipality is auditing a business for compliance with the municipality's business and occupation tax.

Answer: The agency rejects this comment. The State Tax Department has complete authority for the administration of all sales tax, including the municipal sales and service and use tax. Including within that sole authority is the authority to engage in an audit.

Comment 16: We suggest that consideration be given to distributing collections more frequently than quarterly particularly since larger retailers are required to remit collected tax monthly to the Tax Commissioner by electronic funds transfer and to file electronic returns. If municipalities collected their own sales/use taxes, larger retailers would also be remitting tax monthly to the municipality.

Answer: The agency rejects this comment. Almost all taxes distributed locally are distributed on a quarterly basis. Additionally, the nature of this program and the need to pool the revenue prior to recovering the fee necessary to administer this program makes more frequent distribution difficult.

Comment 17: Additionally, we would like to see the Administration in conjunction with the State Treasurer propose legislation specifying when municipalities can anticipate receiving distributions from the State Treasurer after receipt of the Tax Commissioner's requisition on the Treasury. The subject here is not distribution of state funds. Rather, the subject is distribution of funds collected by the Tax Commissioner as agent for the municipalities that impose sales and use taxes.

Answer: The agency rejects this comment. This is a comment on possible proposed legislation, and does not pertain to any substantive issue in the rule.

Comment 18: With all due respect, we believe the subject matter of subsection 110-28-7.1.a comes under the jurisdiction of the State Auditor in his capacity as ex officio the chief inspector and supervisor of public offices pursuant W. Va. Code § 6-9-1 as amended by W. Va. Code § 6-9-11, and should be deleted from the proposed rule.

Answer: The agency rejects this comment. The State Tax Department, as the sole authority for administration of this program, is responsible for the calculation of all costs, charges, refunds, offsets, adjustments and fees. This provision is necessary to effectuate that responsibility.

Comment 19: We suggest that Subsection 110-28-7.4. should be modified to recognize that except as to expenditure of fees collected in FY 2014, the fees collected under the rule may not be expended except in accordance with appropriation by the Legislature, as provided in H.B. 105.

Answer: The agency accepts this comment. This provision has been modified to accurately reflect the language of the enabling legislation.

Comment 20: Subsection 110-28-8.1 is contrary to the plain meaning of W. Va. Code § 8- 13C-6(a) which provides:

> (a) Notification to Tax Commissioner. — Any municipality that imposes a municipal sales and service tax and a municipal use tax pursuant to this article or changes the rate of the taxes shall notify the Tax Commissioner at least one hundred eighty days before the effective date of the imposition of the taxes or the change in the rate of the taxes.

(Emphasis added.) There is no requirement in W. Va. Code § 8-13C-6(a) that imposition of a local sale/use tax, or change in the rate of a local sales/use tax, be delayed until the first day of July following completion of the 180-day notification period provided in W. Va. Code § 8-13C- 6(a). Moreover, the 180-day notification requirement in W. Va. Code § 8-13C-6(a) applies only to sales/use taxes imposed pursuant to W. Va. Code §§ 8-13C-4 and 8-13C-5. It does not apply to sales and use taxes imposed pursuant to W. Va. Code § 8-1-5a.

Answer: The agency rejects this comment. The Tax Department has been given the authority to administer all municipal sales and service and use taxes. Within that authority is the ability to limit the start date of any municipal sales and service and use tax in order to maintain the notice requirements of the SSUTA, provide simplicity, and to reduce the costs of implementation.

Comment 21: Additionally, the 180-day rule in Subsection 110-28-8.1. is contrary legislative intent expressed in the provisions of W. Va. Code § 11-15B-35 (local rate and boundary changes), which allows tax rate and boundary changes to occur for tax administration and collection purposes four times per year.

Answer: The agency rejects this comment. The Tax Department has been given the authority to administer all municipal sales and service and use taxes. Within that authority is the ability to limit the start date of any boundary change to the municipal sales and service and use tax in order to maintain the notice requirements of the SSUTA, provide simplicity, and to reduce the costs of implementation.

Comments from the Monongalia County Commission

Comment 1: Although both the Authorizing Legislation and the Proposed Rule provide for the same, we feel that the Proposed Rule should be clarified to make more explicit that the Administrative Fee would have no applicability to special district excise taxes collected by the Tax Department pursuant to the County Excise Tax Act or Municipal Excise Tax Act. We propose that this might best be accomplished by adding the following language at the end of the paragraphs which are currently contained in Section 4.11 and Section 7.2 of the Proposed Rule: "Provided, however, that such periodic cost recovery fee shall not apply to the collection by the Tax Commissioner of the Excise Tax provided for in W.Va. Code §7-22-1 et seq. and W.Va. Code §8-38-1 et

seq. as such collection is not provided for pursuant to W.Va. Code§11-10-11c and other applicable provisions of law."

Answer: The agency accepts this comment. The proviso above has been added to Section 4.11 and 7.2 of the proposed rule with an addition to clarify the 1% fee provided in 11-10-11b is applicable to such collection.

Comments from the Municipal League

Comment 1: First, the code section 8-13C-8 you cite throughout the proposed rule dealing with the currently authorized municipal sales and use tax in lieu of B&O for all municipalities appears to be inaccurate. I believe that should be 8-13C-6 or 8-13C-1 et seq.

Answer: The agency accepts this comment. A number of the incorrect cross references have been replaced with W.Va. Code §8-13C-1, et. seq.

Comment 2: Second, it was our understanding from the meeting with the Governor that the State would absorb the first year "implementation costs" and begin collecting the administration fee from municipalities once there were actual costs and collections from the cities who were participating. In other words, no up-front implementation cost but an actual table designed on the cost versus collections method once the tax was implemented and collected. That would ensure a true cost established instead of a guestimate followed by a reconciliation of accounts.

Answer: The agency rejects this comment. In order to adequately administer the municipal sales tax, the Tax Department will need ongoing costs reimbursed as they are incurred. The only way to adequately allow for those ongoing costs is to project them and then adjust. It also supports the fiscal notion that the state general fund should not be burdened with the administration of an exclusively local tax.

Comment 3: Third, 4.8 allows the Tax Commissioner (may) to issue an Administrative Notice. We believe that should be mandatory. We also request the communication to the Municipal League be included along with the State Register. (Also include the Municipal League in 4.9 notices)

Answer: The agency rejects this comment. The Tax Department does not believe that issuing an Administrative Notice should be mandatory. It is a permissive way to announce the projected costs, but the Tax Department should not be bound to that one tool. Additionally, while the Tax Department will make every effort to inform the Municipal League of all notices, it should not be bound to do so as extenuating circumstances may lead to failure to provide notice.

Comment 4: Finally, I don't believe the dates used in the proposed rule (the following July 1) will sync up with the real time dates of approval by the Home Rule Board without penalizing municipalities and delaying the implementation of the municipal sales and

use tax. I would suggest you review the dates following the 180 day notice and allow the effective date to be more realistic. If December or January works, look at replacing July 1 with those dates.

Answer: The agency accepts this comment in part. The rule has been modified by adding section 8.1.a. to allow municipalities to provide notice only 150 days prior to the beginning of a calendar quarter upon which the tax will be effective. This change will allow an initial period for new home rule cities to institute a tax without a significant wait. After this initial period, all municipalities should wait until the July 1 following 180 days notice in order to reduce the significant initial costs of implementation.