



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF AN EMERGENCY AMENDMENT TO AN EMERGENCY RULE

AGENCY: Tax TITLE-SERIES: 110-15F

RULE TYPE: Legislative Amendment to Existing Rule: No

RULE NAME: SALES TAX HOLIDAY

CITE STATUTORY AUTHORITY FOR PROMULGATING EMERGENCY RULE:

W. Va. Code §§11-15-9s(c) and 11-10-5

IF THE EMERGENCY RULE WAS PROMULGATED TO COMPLY WITH A TIME LIMIT ESTABLISHED BY CODE OR FEDERAL STATUTE OR REGULATION, CITE THE CODE PROVISION, FEDERAL STATUTE OR REGULATION AND TIME LIMIT ESTABLISHED THEREIN:

No time limit

DATE EMERGENCY RULE WAS ORIGINALLY FILED: 05/07/2021

DATE(S) OF PREVIOUS EMERGENCY AMENDMENT(S)

NONE

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

Filing this rule as an emergency rule is mandated by the language in W. Va. Code § 11-15-9s(c)

DOES THIS EMERGENCY RULE REPEAL A CURRENT RULE? No

HAS THE SAME OR SIMILAR EMERGENCY RULE PREVIOUSLY BEEN FILED AND EXPIRED? No

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

This legislative rule establishes and provides guidance for the Sales Tax Holiday. The legislation provides for an exemption from sales and use tax for items purchased on the first Sunday of August or the previous Friday and Saturday or the following Monday. Exempt items include clothing priced \$125 or less; school supplies priced at \$50 or less; school instructional material priced \$20 or less; laptop and tablet computers, not purchased for use in a trade or business and priced \$500 or less, and sports equipment, not purchased for use in a trade or business, the price of which is \$150 or less. The legislation will result in a loss of State sales tax revenue of approximately \$3.9 million and a decrease of \$350,000 to the municipalities for a total loss of \$4.2 million beginning in FY2022. Additional costs incurred by the State Tax Department would be \$5,000 in FY2022 and each fiscal year thereafter.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

This legislative rule establishes and provides guidance for the Sales Tax Holiday. The legislation provides for an exemption from sales and use tax for items purchased on the first Sunday of August or the previous Friday and Saturday or the following Monday. Exempt items include clothing priced \$125 or less; school supplies priced at \$50 or less; school instructional material priced \$20 or less; laptop and tablet computers, not purchased for use in a trade or business and priced \$500 or less, and sports equipment, not purchased for use in a trade or business, the price of which is \$150 or less. The legislation will result in a loss of State sales tax revenue of approximately \$3.9 million and a decrease of \$350,000 to the municipalities for a total loss of \$4.2 million beginning in FY2022. Additional costs incurred by the State Tax Department would be \$5,000 in FY2022 and each fiscal year thereafter.

C. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

This legislative rule establishes and provides guidance for the Sales Tax Holiday. The legislation provides for an exemption from sales and use tax for items purchased on the first Sunday of August or the previous Friday and Saturday or the following Monday. Exempt items include clothing priced \$125 or less; school supplies priced at \$50 or less; school instructional material priced \$20 or less; laptop and tablet computers, not purchased for use in a trade or business and priced \$500 or less, and sports equipment, not purchased for use in a trade or business, the price of which is \$150 or less. The legislation will result in a loss of State sales tax revenue of approximately \$3.9 million and a decrease of \$350,000 to the municipalities for a total loss of \$4.2 million beginning in FY2022. Additional costs incurred by the State Tax Department would be \$5,000 in FY2022 and each fiscal year thereafter. Vendors, including both brick and mortar and e-commerce firms, do incur costs associated with complying with the temporary rule changes associated with the Sales Tax Holiday statute. Those costs may be partially recovered by offering consumers smaller discounts during the holiday period. This proposed rule seeks to help limit such costs to vendors through establishment of clarifications of policy and administrative guidance.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2021 Increase/Decrease (use "-")	2022 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	5,000.00	5,000.00
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0		0
Other	0	5,000.00	0
2. Estimated Total Revenues	0	-4,200,000.00	-4,200,000.00

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

This legislative rule establishes and provides guidance for the Sales Tax Holiday. The legislation provides for an exemption from sales and use tax for items purchased on the first Sunday of August or the previous Friday and Saturday or the following Monday. Exempt items include clothing priced \$125 or less; school supplies priced at \$50 or less; school instructional material priced \$20 or less; laptop and tablet computers, not purchased for use in a trade or business and priced \$500 or less, and sports equipment, not purchased for use in a trade or business, the price of which is \$150 or less. The legislation will result in a loss of State sales tax revenue of approximately \$3.9 million and a decrease of \$350,000 to the municipalities for a total loss of \$4.2 million beginning in FY2022. Additional costs incurred by the State Tax Department would be \$5,000 in FY2022 and each fiscal year thereafter. Vendors, including both brick and mortar and e-commerce firms, do incur costs associated with complying with the temporary rule changes associated with the Sales Tax Holiday statute. Those costs may be partially recovered by offering consumers smaller discounts during the holiday period. This proposed rule seeks to help limit such costs to vendors through establishment of clarifications of policy and administrative guidance.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Allen R Prunty -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 110
LEGISLATIVE RULE
STATE TAX DEPARTMENT
(EMERGENCY RULE)

SERIES 15F
SALES TAX HOLIDAY

§110-15F-1. General.

1.1. Scope. -- This rule clarifies, explains and implements the Sales Tax Holiday for purchases of certain school supplies, school instructional materials, laptop and tablet computers, and sports equipment as authorized by W. Va. Code §11-15-9s.

1.2. Authority. -- W. Va. Code §§11-15-9s(c) and 11-10-5.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect on August 1, 2027.

§110-15F-2. Interpretive Note.

This rule shall be read *in pari materia* with the legislative rule for the consumers sales and service tax and use tax codified in 110 C.S.R. 15. The definitions, policies and procedures provided in 110 C.S.R. 15 are equally applicable to this rule. All sales and services are presumed to be taxable unless there is an applicable exemption. Should there be any inconsistency between this rule and 110 C.S.R. 15, the language of 110 C.S.R. 15 shall control, except to the extent it does not reflect the amendment to the consumers sales and use tax laws that is addressed in this rule.

§110-15F-3. Definitions.

3.1. Unless a specific definition is provided in this section, or the context in which the term is used clearly requires a different meaning, the terms used in this rule have the definitions provided under W. Va. Code §§11-15-2, 11-15A-1, and 11-15B-2.

3.2. “Clothing” means “clothing” as defined in W. Va. Code §11-15B-2.

3.3. “Computer” means an electronic device that accepts information in digital or similar form and manipulates the information for a result based on a sequence of instructions, as defined in W. Va. Code §11-15B-2.

3.4. “Eligible item” means tangible personal property that is exempt from tax under W. Va. Code §11-15-9s and this rule that is purchased during the sales tax holiday period. “Eligible item” includes, and is limited to: certain clothing with a purchase price of \$125.00 or less; certain school supplies with a purchase price of \$50.00 or less; certain school instruction material with a purchase price of \$20.00 or less; certain laptop and tablet computers that are not purchased for use in a trade or business and with a purchase price of \$500.00 or less; and certain sports equipment that is not purchased for use in a trade or business and with a purchase price of \$150.00 or less.

3.5. "Holiday" or "exemption period" means the sales tax holiday exemption period authorized by W. Va. Code §11-15-9s, which consists of the first Sunday of August, the previous Friday and Saturday and the following Monday. The exemption period starts at 12:01 a.m. eastern daylight time on the Friday date and ends at midnight eastern daylight time on the Monday date.

3.6. "Laptop computer" means a computer that is portable, capable of operating on battery power, with a physical keyboard, a mouse trackpad, and may have capacity to play CD or DVD ROM. The term includes only the hardware device, any necessary or bundled peripherals such as a charging cord, and pre-loaded software included in the purchase of the laptop computer. Any separately purchased peripheral such as a separate mouse, keyboard or screen is not included in the definition of laptop computer. Any separately purchased software is not included in the definition of laptop computer.

3.7. "Purchased for use in a trade or business" means that the item is purchased with the primary intent of using it in a trade or business, rather than for educational or personal purposes. For purposes of this definition, the term "trade or business" means any activity engaged in by any person or caused to be engaged in by any person with the object of direct or indirect gain, benefit, or advantage.

3.8. "School instructional material" means "school instructional material" as defined in W. Va. Code §11-15B-2.

3.9. "School supplies" means "school supply" as defined in W. Va. Code §11-15B-2.

3.10. "Sports equipment" means "sport or recreational equipment" as defined in W. Va. Code §11-15B-2.

3.11. "Tablet computer" means a computer that is portable, uses a touchscreen for all functions, and does not have the capacity to play CD or DVD ROM. The term includes only the hardware device, any necessary or bundled peripherals such as a charging cord, and pre-loaded software included in the purchase of the tablet computer. Any separately purchased peripheral such as a separate mouse, keyboard or screen is not included in the definition of tablet computer. Any separately purchased software is not included in the definition of tablet computer.

§110-15F-4. Articles normally sold as a unit.

4.1. Articles that are normally sold as a unit must continue to be sold as a unit. The retailer may not separate items normally sold as a unit and sell them separately in order to obtain the exemption. A retailer may not separately state the price of each item normally sold as a unit in order to obtain the exemption. The following examples illustrate application of this rule:

Example 1: A pair of shoes normally sells for \$150.00. The pair cannot be split in order to sell each shoe for \$75.00 to qualify for the exemption.

Example 2: A suit is normally priced at \$200.00 on a single price tag. The suit may not be split into separate articles so that each or any of the items may be sold for under \$125.00 in order to qualify for the exemption. However, when components of a suit are normally sold and priced as separate articles, they may continue to be sold as separate articles and qualify for the exemption, if the price for each article is less than \$125.00.

§110-15F-5. Buy one, get one free or for a reduced price.

5.1. The total price of items advertised as "buy one, get one free" or "buy one, get one for a reduced price" may not be averaged in order for both items to qualify for the exemption. The following examples illustrates application of this rule:

Example 1: A retailer advertises pants as "buy one, get one free." The first pair of pants is priced at \$150.00; the second pair of pants is free. Tax is due on \$150.00. The store cannot sell each pair at \$75.00 in order for the items to qualify for the exemption. However, the retailer may advertise and sell the items for 50 percent off, selling each pair of \$150.00 pants for \$75.00, making each pair eligible for the exemption.

Example 2: A retailer advertises shoes as "buy one pair at the regular price, get a second pair for half price." The first pair of shoes is sold for \$140.00; the second pair is sold for \$70.00 (half price). Tax is due on the \$140.00 shoes, but not on the \$70.00 shoes. The store cannot sell each pair of shoes for \$105.00 in order for the items to qualify for the exemption. However, a retailer may advertise each pair for 25 percent off, thereby selling each pair of \$140.00 shoes for \$105.00, making each pair eligible for the exemption.

§110-15F-6. Exchanging a tax-exempt purchase after the Holiday ends.

6.1. When a customer purchases an eligible item during the Holiday and later exchanges the item for the same item (different size, different color, etc.), no tax will be due even if the exchange is made after the Holiday ends, unless the sales price of the second item is greater than the sales price of the exchanged item. In this situation, the retailer must collect tax on the entire sales price of the exchanged item unless the exchange occurs during the Holiday and the sales price of the second item is less than the applicable threshold.

6.2. When a customer purchases an eligible item during the Holiday and later returns the item and receives credit on the purchase of a different item, the appropriate tax must be collected measured by the full sales price of the newly purchased item, unless the new purchase occurs during the Holiday and the sales price is less than the applicable threshold.

Example 1: During the Holiday, a customer purchases a \$90.00 dress that qualifies for the exemption. Later, during the Holiday, the customer exchanges the \$90.00 dress for a \$130.00 dress. Tax is due on the \$130.00 dress. The \$90.00 credit from the returned item cannot be used to reduce the sales price of the \$130.00 item to \$40.00 for exemption purposes.

Example 2: A customer purchases a \$35.00 shirt during the Holiday. After the Holiday ends, the customer exchanges the shirt for a \$35.00 jacket. Since the jacket was not purchased during the Holiday, tax is due on the \$35.00 price of the jacket.

§110-15F-7. Returning an eligible item.

When a customer returns an eligible item purchased during the Holiday, the retailer may refund tax only if the customer produces a receipt or invoice showing tax was paid on the item, or if the retailer has sufficient documentation to show that tax was paid on the specific item.

§110-15F-8. Coupons and discounts.

8.1. Manufacturer's coupons do not reduce the sales price of an item. Therefore, a manufacturer's coupon cannot be used to reduce the selling price of an item to less than the applicable threshold in order to qualify for the exemption.

Example: A jacket sells for \$105.00. The customer has a \$10.00 manufacturer's coupon good for the purchase of the jacket. The manufacturer's coupon does not reduce the sales price of the jacket. Tax is due on the \$105.00 even though the customer only pays the retailer \$95.00 for the jacket.

8.2 Store coupons and discounts do reduce the sales price of an item. Therefore, a store coupon or discount can be used to reduce the sales price of an item to less than the threshold amount in order to qualify for the exemption.

Example: A customer buys a \$400.00 suit and a \$110.00 shirt. The retailer is offering a 10 percent discount. After applying the 10 percent discount, the final sales price of the suit is \$360.00, and the sales price of the shirt is \$99.00. The suit is taxable (it is over \$125.00) and the shirt is exempt (it is less than \$125.00).

§110-15F-9. Gift certificates.

The sale of a gift certificate is not taxable. Eligible items sold and delivered during the Holiday using a gift certificate will qualify for the exemption regardless of when the gift certificate was purchased. Eligible items sold and delivered after the Holiday using a gift certificate are taxable even if the gift certificate was purchased during the Holiday. A gift certificate cannot be used to reduce the selling price of an item to under the threshold amount in order for the item to qualify for the exemption.

§110-15F-10. Layaway sales.

10.1. A layaway sale is a transaction in which merchandise selected by the customer is set aside for future delivery to the customer who makes a deposit, agrees to pay the balance of the purchase price over a period of time and, at the end of the payment period, receives the merchandise.

10.2. Eligible items will qualify for the exemption if during the Holiday (1) a retailer and a customer enter into a layaway sale agreement, (2) the customer makes the usual deposit in accordance with the retailer's layaway policy, and (3) the merchandise is segregated from the retailer's inventory.

10.3. Eligible items will also qualify for exemption if prior to the Holiday (1) a retailer and a customer entered into a layaway sale agreement, (2) the customer made the usual deposit in accordance with the retailer's layaway policy, (3) the merchandise was segregated from the retailer's inventory and (4) the customer makes the final payment and takes delivery of the merchandise during the Holiday.

§110-15F-11. Mail, telephone, e-mail, and internet orders and custom orders.

11.1. Under West Virginia sales tax law, a sale of tangible personal property occurs when a purchaser receives title to or possession of the property for consideration. Accordingly, an eligible item qualifies for the sales tax holiday exemption if:

11.1.1. The item is both delivered to and paid for by the customer during the exemption period; or

11.1.2. The customer orders and pays for the item and the retailer accepts the order during the exemption period for immediate shipment, even if physical delivery is made after the exemption period.

11.2. A retailer accepts an order when the retailer has taken action to fill the order for immediate shipment. Actions to fill an order include placement of an "in date" stamp on a mail order, or assignment of an "order number" to a telephone, e-mail or Internet order.

11.3. An order is for immediate shipment when the customer does not request delayed shipment. An order is for immediate shipment notwithstanding that the shipment may be delayed because of a backlog of orders, or because stock is currently unavailable to the retailer, or because the item needs to be custom made.

§110-15F-12. Rain checks.

Eligible items that customers purchase during the Holiday using a rain check qualify for the exemption regardless of when the rain check was issued. However, issuance of a rain check during the Holiday will qualify an eligible item for the exemption only if the purchased price is paid in full at the time the rain check is issued. If the item is actually sold after the Holiday, the Holiday exemption does not apply.

§110-15F-13. Rebates.

13.1. Rebates generally occur after the sale and do not affect the sales price of an item for sales tax purposes. Even when the manufacturer's rebate is applied by the retailer at the time of sale, the rebate amount does not reduce the sales price of the item for sales tax purposes.

Example 1. A jacket sells for \$130.00. The customer receives a \$10.00 mail-in rebate from the manufacturer. The rebate occurs after the sale and does not reduce the sales price of the jacket. Tax is due on \$130.00.

Example 2. A dress sells for \$130.00. As a promotion for its new line of dresses, the manufacturer is offering an in-store instant rebate of \$30.00, which the retailer allows at the cash register. Even though the net sales price to the customer is \$100.00, the purchase is taxable and sales tax must be collected on \$130.00. The money the retailer received for the sale was \$100.00 from the customer plus \$30.00 from the manufacturer.

§110-15F-14. Repairs and alterations.

14.1. Repairs to eligible items do not qualify for the Holiday exemption. Alterations to eligible items do not qualify for the exemption even though alterations may be sold, invoiced, and paid for at the same time as the item to be altered.

Example: A customer purchases a pair of pants for \$120.00 and pays \$10.00 to the retailer to have the pants cuffed. The \$120.00 charge for the pants is exempt; however, tax is due on the \$10.00 alteration charge.

§110-15F-15. Refunds.

15.1. A customer who pays West Virginia sales or use tax to a vendor when no tax is due may either seek a refund of the tax paid from that vendor or apply to the State Tax Department for a refund.

15.1.1. Retailers are encouraged to refund the tax to any customer who was charged sales or use tax on an exempt purchase. Customers who were charged tax by a vendor for an exempt purchase should take their tax paid receipt to the retailer to facilitate obtaining the refund.

15.1.2. If the retailer has not already remitted the tax to the State Tax Department, the retailer should simply refund the tax to the customer. If the retailer has remitted the tax to the State Tax Department, the retailer should refund the tax to the customer and then take a credit for the tax refunded on the retailer's next sales or use tax return.

15.2. If the retailer refuses to refund the tax, the customer may file a claim for refund with the State Tax Department. The original sales receipt showing (1) the date of the purchase, (2) a description of the item purchased, (3) the name of the retailer, (4) the place or store number where the sale was made, and (5) the amount of tax paid shall be attached to the claim for refund.

15.3. The State Tax Department may not refund sales or use tax paid to another state.

§110-15F-16. Shipping and handling charges.

16.1. Shipping and handling charges that are separately stated are taxable.

Example. The sales price of an eligible item purchased during the Holiday is \$85.00 and the shipping and handling charges are \$15.00 for a total of \$100.00. Tax must be collected on the \$15.00.

§110-15F-17. Records and reporting.

No special record-keeping or reporting is necessary. Records should be maintained as currently required by law or rules of the Tax Commissioner.

§110-15F-18. Exceptions

18.1. This Holiday exemption does not apply to:

18.1.1. The rental of clothing, school supplies, school instructional material, laptop computers, tablet computers, or sports equipment;

18.1.2. The sale or rental of tangible personal property for use in a trade or business.

18.2. For purposes of this rule, purchase payments made through the use of a business check or business credit card are presumed to be for use in a trade or business and are not exempt from tax under the Holiday exemption.