

# **WEST VIRGINIA LEGISLATURE**

**2021 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 445**

BY SENATORS RUCKER, STOLLINGS, WOELFEL, BALDWIN,

GRADY, HAMILTON, AND UNGER

[Originating in the Committee on Economic

Development; reported on March 4, 2021]

1 A BILL to amend and reenact §11-13X-3, §11-13X-4, §11-13X-5, §11-13X-6, §11-13X-8, §11-  
2 13X-11, §11-13X-12, and §11-13X-13 of the Code of West Virginia, 1931, as amended,  
3 all relating to the West Virginia Film Industry Investment Act; reinstating the film  
4 investment tax credit; providing the coordination and management by the West Virginia  
5 Development Office; defining “Development Office” and “multi-state distribution”;  
6 excluding short-term depreciation from credit; raising the minimum threshold of cumulative  
7 annual expenditures necessary to qualify for credit; establishing an annual limit in credits  
8 available; requiring the Development Office to develop a database of locations, music,  
9 and other resources to be made available to film production teams; requiring state  
10 agencies to solicit bids from West Virginia vendors for film or video projects if available;  
11 and giving retroactive effect to film investment tax credit program.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 13X. WEST VIRGINIA FILM INDUSTRY INVESTMENT ACT.**

**§11-13X-3. Definitions.**

1 (a) *General.* – When used in this article, or in the administration of this article, terms  
2 defined in subsection (b) of this section have the meanings ascribed to them by this section,  
3 unless a different meaning is clearly required by the context in which the term is used.

4 (b) *Terms defined.* –

5 (1) “Commercial exploitation” means reasonable intent for public viewing for the delivery  
6 medium used.

7 (2) “Development office” means the West Virginia Development Office, which is a division  
8 of the West Virginia Department of Commerce.

9 ~~(2)~~ (3) “Direct production expenditure” means a transaction that occurs in the State of  
10 West Virginia or with a West Virginia vendor and includes:

11 (A) Payment of wages, fees, and costs for related fringe benefits provided for talent,  
12 management or labor that are subject to West Virginia income tax;

13 (B) Payment to a personal services corporation for the services of a performing artist if:

14 (i) The personal services corporation is subject to West Virginia income tax on those  
15 payments; and

16 (ii) The performing artist receiving payments from the personal services corporation is  
17 subject to West Virginia income tax; and

18 (C) Any of the following provided by a vendor:

19 (i) The story and scenario to be used by a qualified project;

20 (ii) Set construction and operations, wardrobe, accessories, and related services;

21 (iii) Photography, sound synchronization, lighting, and related services;

22 (iv) Editing and related services;

23 (v) Rental of facilities and equipment;

24 (vi) Leasing of vehicles;

25 (vii) Food or lodging;

26 (viii) Airfare if purchased through a West Virginia-based travel agency or travel company;

27 (ix) Insurance coverage and bonding if purchased through a West Virginia-based  
28 insurance agent; and

29 (x) Other direct costs of producing a qualified project in accordance with generally  
30 accepted entertainment industry practices: Provided, That "direct production expenditure" shall  
31 not include depreciation of any item that has less than one full year of depreciable life.

32 ~~(3)~~ (4) "Eligible company" means a person or business entity engaged in the business of  
33 producing film industry productions. The term excludes state agencies.

34 ~~(4)~~ (5) "Feature length" means in excess of 40 minutes.

35 ~~(5)~~ (6) "Film industry production" means a qualified project intended for reasonable  
36 national or international commercial exploitation.

37 ~~(6)~~ "Film office" means the West Virginia Film Office, which is a division of the West  
38 Virginia Department of Commerce

39 (7) "Multi-state distribution" means reaching at least one other state besides West Virginia.

40 ~~(7)~~ (8) "Postproduction expenditure" means a transaction that occurs in West Virginia or  
41 with a West Virginia vendor after the completion of principal photography, including editing and  
42 negative cutting; Foley recording and sound effects; automatic dialogue replacement (also known  
43 as ADR or dubbing); special effects or visual effects, including computer-generated imagery or  
44 other effects; scoring and music editing; sound editing; beginning and end credits; soundtrack  
45 production; subtitling or addition of sound or visual effects; but not including an expenditure for  
46 advertising, marketing, distribution, or expense payments.

47 ~~(8)~~ (9) "Qualified project" means a feature length theatrical or direct-to-video motion  
48 picture, a made-for-television motion picture, a commercial or other promotional video, a music  
49 video, commercial still photography, a television pilot program, a television series, and a television  
50 mini-series that incurs a ~~minimum of \$25,000~~ cumulative amount of \$50,000 in a calendar year in  
51 direct production expenditures and post-production expenditures, as defined by this subsection,  
52 in West Virginia or any combination of projects not previously claimed that would qualify for the  
53 credit except for cost, and that combined meets or exceeds the cumulative amount of \$50,000 in  
54 a calendar year. The term excludes news or current affairs programming, a weather or market  
55 program, ~~an interview or~~ a talk show, a sporting event or show, an awards show, a gala, a  
56 production that solicits funds, a home shopping program, a program that primarily markets a  
57 product or service, political advertising, or a concert production.

58 A qualified project may be produced on any single media or multimedia program that:

59 (A) Is fixed on film, digital medium, videotape, computer disk, laser disc, or other similar  
60 delivery medium;

61 (B) Can be viewed or reproduced;

62 (C) Is not intended to and does not violate §61-8C-1 *et seq.* of this code;

63 (D) Does not contain obscene matter or sexually explicit conduct, as defined by §61-8A-1  
64 *et seq.* of this code;

65 (E) Is intended for reasonable commercial exploitation for the delivery medium used  
66 whether delivery is in state or multi-state distribution; and

67 (F) Does not contain content that portrays the state of West Virginia in a significantly  
68 derogatory manner.

69 ~~(9)~~(10) "Tax Commissioner" means the West Virginia State Tax Commissioner or his or  
70 her designee.

**§11-13X-4. Creation of the tax credit.**

1 (a) An eligible company may apply for, and the Tax Commissioner shall allow, a  
2 nonrefundable tax credit in an amount equal to the percentage specified in §11-13X-5 of this code  
3 of:

4 (1) Direct production expenditures incurred in West Virginia that are directly attributable to  
5 the production in West Virginia of a qualified project ~~and that~~ which expenditures occur in West  
6 Virginia or with a West Virginia vendor; and

7 (2) Postproduction expenditures incurred in West Virginia that are:

8 (A) Directly attributable to the production of a qualified project;

9 (B) For services performed in West Virginia.

10 (b) Expenditures utilized by an eligible company for purposes of calculating the tax credit  
11 authorized by this article shall in no event be utilized by the eligible company for the purpose of  
12 calculating or qualifying investment for claiming the economic opportunity tax credit authorized by  
13 §11-13Q-1 *et seq.* of this code or the manufacturing investment tax credit authorized by §11-13S-  
14 1 *et seq.* of this code.

**§11-13X-5. Amount of credit allowed; limitation of the credits.**

1 (a) *Base allowance.* – The amount of credit allowed to every eligible company, except as  
2 provided in subsection (b) of this section, is 27 percent.

3 (b) *Extra allowance for hiring of local workers.* – Any amount allowed in subsection (a) of  
4 this section shall be increased by an additional four percent if the eligible company, or its

5 authorized payroll service company, employs 10 or more West Virginia residents as part of its full-  
6 time employees working in the state or as apprentices working in the state.

7 (c) *Application of the credits.* – The tax credit allowed under this section shall be applied  
8 to the eligible company’s state tax liability as provided in §11-13X-7 of this code.

9 (d) *Limitation of the credits.* – No more than ~~\$5~~ \$10 million of the tax credits may be  
10 allocated by the ~~film~~ development office in any given West Virginia state fiscal year: Provided,  
11 That the development office may allocate a greater amount of credit for any feature length film  
12 produced with “West Virginia” in the title or if the subject of the film is clearly identified as West  
13 Virginia. The ~~film~~ development office shall allocate the tax credits in the order the applications  
14 therefor are received.

**§11-13X-6. Requirements for credit.**

1 (a) In order for any eligible company to claim a tax credit under this article, it shall comply  
2 with the following requirements:

3 (1) If the qualified project contains production credits, the eligible company shall agree,  
4 upon request by the ~~film~~ development office, to recognize the State of West Virginia with the  
5 following acknowledgment in the end credit roll: “Filmed in West Virginia with assistance of the  
6 West Virginia Film Industry Investment Act”;

7 (2) Apply to the ~~film~~ development office on forms and in the manner the ~~film~~ development  
8 office may prescribe; and

9 (3) If an eligible company submits a proposal to perform a qualified project for a state  
10 agency, the eligible company shall indicate its intention to claim the tax credit provided by this  
11 article.

12 ~~(3)~~ (4) Submit to the ~~film~~ development office information required by the ~~film~~ development  
13 office to demonstrate conformity with the requirements of this section and shall agree in writing:

14 (A) To pay all obligations the eligible company has incurred in West Virginia; and

15 (B) To delay filing of a claim for the tax credit authorized by this article until the ~~film~~

16 development office delivers written notification to the Tax Commissioner that the eligible company  
17 has fulfilled all requirements for the credit.

18 The ~~film~~ development office shall determine the eligibility of the company and the  
19 qualification of each project, and shall report this information to the Tax Commissioner in a manner  
20 and at times the ~~film~~ development office and the Tax Commissioner shall agree upon.

21 (b) Upon completion of a qualified project:

22 (1) An eligible company shall have filed all required West Virginia tax reports and returns  
23 and paid any balance of West Virginia tax due on those returns;

24 (2) All claims for the tax credit shall be filed with an expense verification report prepared  
25 by an independent certified public accountant, utilizing "agreed upon procedures" which are  
26 prescribed by the ~~film~~ development office in accordance with generally accepted auditing  
27 standards in the United States. The certified public accountant will render a report as to the  
28 qualification of the credits, consistent with guidelines to be determined by the ~~film~~ development  
29 office and approved by the Tax Commissioner; and

30 (3) An eligible company claiming an extra allowance for employing local workers shall  
31 submit to the ~~film~~ development office documentation verifying West Virginia residency for all  
32 individuals claimed to qualify for the extra allowance. The documentation shall include the name,  
33 home address, and telephone number for all individuals used to qualify for the extra allowance.

34 (c) If the requirements of this section have been complied with, the ~~film~~ development office  
35 shall approve the film tax credit and issue a document granting the appropriate tax credit to the  
36 eligible company and shall report this information to the Tax Commissioner.

**§11-13X-8. Uses of credit; unused credit; carry forward; carry back prohibited; expiration  
and forfeiture of credit.**

1 (a) No credit is allowed under this section against any employer withholding taxes imposed  
2 by §11-21-1 *et seq.* of this code.

3 (b) If the tax credit allowed under this article in any taxable year exceeds the sum of the

4 taxes enumerated in subsections (b), (c), or (d) of §11-13X-7 of this code, for that taxable year,  
5 the excess may be applied against those taxes, in the order and manner stated in §11-13X-7 of  
6 this code, for succeeding taxable years until the earlier of the following:

7 (1) The full amount of the excess tax credit is used;

8 (2) The expiration of the second taxable year after the taxable year in which the  
9 expenditures occurred. The tax credit remaining thereafter is forfeited; or

10 (3) The excess tax credit is transferred or sold.

11 (c) No carryback is allowed to a prior taxable year that does not have qualified  
12 expenditures for the amount of any unused portion of any annual credit allowance.

13 (d) The transfer or sale of this credit does not extend the time in which the credit can be  
14 used. The carry forward period for credit that is transferred or sold begins on the date on which  
15 the credit was originally issued by the ~~film~~ development office.

16 (e) Any tax credit certificate issued in accordance with this article, which has been issued  
17 to an eligible company, and to the extent not previously claimed against the tax of the eligible  
18 company or the owner of the certificate, may be transferred or sold by such eligible company to  
19 another West Virginia taxpayer, subject to the following conditions:

20 (1) A single transfer or sale may involve one or more transferees, assignees, or  
21 purchasers. A transfer or sale of the credits may involve multiple transfers to one or more  
22 transferees, assignees, or purchasers;

23 (2) Transferors and sellers shall apply to the ~~film~~ development office for approval of any  
24 transfer, sale, or assignment of the tax credit. Any amount of the tax credit that has been  
25 transferred or assigned shall be subject to the same limitations and conditions that apply to the  
26 eligible company's or seller's entitlement, use and application of the credit. The application for  
27 sale, transfer or assignment of the credit shall include the transferor's tax credit balance prior to  
28 transfer, the credit certificate number, the name of the seller, the transferor's remaining tax credit  
29 balance after transfer, if any, all tax identification numbers for both transferor and transferee, the

30 date of transfer, the amount transferred, a copy of the credit certificate, and any other information  
31 required by the ~~film~~ development office or the Tax Commissioner.

32 (3) The ~~film~~ development office shall not approve the transfer or assignment of a tax credit  
33 if the seller or transferor has an outstanding tax obligation with the State of West Virginia for any  
34 prior taxable year.

35 (f) The transferee, assignee, or purchaser shall apply such credits in the same manner  
36 and against the same taxes as specified in this article.

37 (g) For purposes of this chapter, any proceeds received by the eligible company or  
38 transferor for its assignment or sale of the tax credits allowed pursuant to this section are exempt  
39 from the West Virginia consumers sales and service tax, use tax, the corporate net income tax,  
40 and personal income tax.

41 (h) The Tax Commissioner shall not seek recourse against the transferee for any portion  
42 of the credit that may be subsequently disqualified.

43 Failure to comply with this section will result in the disallowance of the tax credit until the  
44 seller or transferor is in full compliance.

**§11-13X-11. Tax credit review and accountability.**

1 (a) Beginning on the first day of the third taxable year after the passage of this article and  
2 every two years thereafter, the ~~film~~ development office shall submit to the Governor, the President  
3 of the Senate, and the Speaker of the House of Delegates a tax credit review and accountability  
4 report evaluating the cost effectiveness of the Film Industry Investment Act during the most recent  
5 two-year period for which information is available. The criteria to be evaluated shall include, but  
6 not be limited to, for each year of the two-year period:

- 7 (1) The number of eligible companies claiming the credit;
- 8 (2) The dollar amount of tax credit certificates issued to taxpayers;
- 9 (3) The number of new businesses created by the tax credit;
- 10 (4) The number of new jobs, if any, created by the tax credit;

11 (5) The amount of direct expenditures made on qualified projects; and

12 (6) The cost of the credit.

13 (b) Eligible companies claiming the credit shall provide any information the Tax  
14 Commissioner and the ~~film~~ development office may require to prepare the report: *Provided*, That  
15 the information provided is subject to the confidentiality and disclosure provisions of §11-10-5d  
16 and §11-10-5s of this code. However, notwithstanding the provisions of §11-10-5d and §11-10-  
17 5s of this code, the Tax Department is hereby authorized to disclose to the ~~film~~ and to the  
18 development office such tax information as may be necessary to compile the report required by  
19 this section and the report required by §11-13X-12 of this code.

**§11-13X-12. Economic development; utilization of state locations, talent, and production  
companies.**

1 (a) The West Virginia Development Office, in consultation and coordination with the  
2 appropriate public and private entities, shall promote, foster, encourage, and monitor the  
3 development of the film industry in this state as part of its comprehensive economic development  
4 strategy for West Virginia and report recommendations for expanding the industry in the state to  
5 the Governor and the Joint Committee on Government and Finance annually on or before  
6 December 1.

7 (b) The West Virginia Development Office shall coordinate with property owners,  
8 musicians, and other performers, and other managers of resources suitable for film production,  
9 to develop a database of locations, music, and other resources available for incorporation into  
10 film projects. To the greatest feasible extent, the development office shall establish methods for  
11 interface with national and international databases of these resources that are available to, or  
12 used by, film and video production teams in the identification and selection of location, music, and  
13 other resources. The development office shall also implement means for property owners and for  
14 staff in the field to connect to the state's database and to submit entries or nominations thereto.

15 (c) Every agency of the State of West Virginia that contracts for video production of

16 advertising, promotional material, educational programs, or dramatic works shall obtain bids from  
17 West Virginia production companies and marketing businesses, if available, in the solicitation of  
18 vendors for such projects.

**§11-13X-13. Effective date; ~~elimination of film tax credits~~, preservation of film tax credits  
earned prior to the sunset date; cessation of the West Virginia Film Office.**

1 (a) The credit allowed by this article shall be allowed upon eligible expenditures occurring  
2 after December 31, 2007.

3 (b) The amendments to this article enacted in the year 2009 shall apply to all taxable years  
4 beginning after December 31, 2007, and shall apply with retroactive effect with relation to taxable  
5 years beginning prior to the date of passage of such amendments.

6 ~~(c) No tax credits authorized under this article shall be issued following the effective date~~  
7 ~~of legislation establishing this subsection, §11-13X-13(d), and §11-13X-13(e) of this code in the~~  
8 ~~year 2018. Notwithstanding any provision of this article to the contrary, no entitlement to any tax~~  
9 ~~credit under this article may result from, and no credit is available to any person for, expenditures~~  
10 ~~incurred following the effective date of this subsection.~~

11 ~~(d)~~ (c) Notwithstanding the provisions of ~~§11-13X-13(e)~~ of this code, film Film tax credits  
12 to which a taxpayer has gained lawful entitlement prior to the effective date of this subsection,  
13 may continue to be applied against tax liabilities, subject to the conditions, limitations, and  
14 constraints applicable to such credit under this article, until exhausted or otherwise terminated in  
15 accordance with the terms of this article and this code. Film tax credits to which a taxpayer has  
16 gained lawful entitlement prior to the effective date of this subsection may be transferred in  
17 accordance with §11-13X-8 of this code, subject to the conditions, limitations, and constraints  
18 applicable to such credit under this article, until exhausted or otherwise terminated in accordance  
19 with the terms of this article and this code.

20 ~~(e)~~ (d) Effective July 1, 2018, all operations of the West Virginia Film Office shall cease.  
21 To the extent necessary to settle, finalize, and conclude business relating to outstanding film tax

22 credits issued prior to the effective date of the bill, the Division of Tourism is hereby authorized to  
23 administer such duties for that limited purpose.

24 (e) The amendments to this article enacted in the year 2021, shall apply to all taxable  
25 years beginning after December 31, 2017, and shall apply with retroactive effect with relation to  
26 taxable years beginning prior to the date of passage of such amendments.

NOTE: The purpose of this bill is to restore the film tax credit program in West Virginia.

Strike-throughs indicate language that would be stricken from a heading or the present law,  
and underscoring indicates new language that would be added.