

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

Senate Bill 289

FISCAL
NOTE

BY SENATORS SMITH AND CLINE

[Introduced January 16, 2018; Referred
to the Committee on Finance]

1 A BILL to amend and reenact §11-13Q-3, §11-13Q-7, and §11-13Q-19 of the Code of West
2 Virginia, 1931, as amended, all relating to entitling natural resource producers to the
3 economic opportunity tax credit; allowing the credit to be used to offset the severance tax;
4 establishing conditions; and modifying definitions.

Be it enacted by the Legislature of West Virginia:

ARTICLE 13Q. ECONOMIC OPPORTUNITY TAX CREDIT.

§11-13Q-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 either the context in which the term is used, or
4 by specific definition, in this article.

5 (b) *Terms defined.*

6 (1) *Business.* -- The term "business" means any activity which is engaged in by any
7 person in this state which is taxable under §11-13-1 *et seq.*, §11-13A-1 *et seq.*, §11-21-1 *et seq.*,
8 §11-23-1 *et seq.* or §11-24-1 *et seq.* of this code (or any combination of those articles of this
9 chapter).

10 (2) *Business expansion.* -- The term "business expansion" means capital investment in a
11 new or expanded business facility in this state.

12 (3) *Business facility.* -- The term "business facility" means any factory, mill, plant, refinery,
13 warehouse, building or complex of buildings located within this state, including the land on which
14 it is located, and all machinery, equipment and other real and personal property located at or
15 within the facility, used in connection with the operation of the facility, in a business that is taxable
16 in this state, and all site preparation and start-up costs of the taxpayer for the business facility
17 which it capitalizes for federal income tax purposes.

18 (4) *Commissioner or Tax Commissioner.* -- The terms "commissioner" and "Tax
19 Commissioner" are used interchangeably herein and mean the Tax Commissioner of the State of

20 West Virginia, or his or her designee.

21 (5) *Compensation*. -- The term "compensation" means wages, salaries, commissions and
22 any other form of remuneration paid to employees for personal services.

23 (6) *Controlled group*. -- The term "controlled group" means one or more chains of
24 corporations connected through stock ownership with a common parent corporation if stock
25 possessing at least fifty percent of the voting power of all classes of stock of each of the
26 corporations is owned directly or indirectly by one or more of the corporations; and the common
27 parent owns directly stock possessing at least fifty percent of the voting power of all classes of
28 stock of at least one of the other corporations.

29 (7) *Corporation*. -- The term "corporation" means any corporation, joint-stock company or
30 association, and any business conducted by a trustee or trustees wherein interest or ownership
31 is evidenced by a certificate of interest or ownership or similar written instrument.

32 (8) *Designee*. -- The term "designee" in the phrase "or his or her designee," when used
33 in reference to the commissioner, means any officer or employee of the State Tax Department
34 duly authorized by the commissioner directly, or indirectly by one or more redelegations of
35 authority, to perform the functions mentioned or described in this article.

36 (9) *Eligible taxpayer*. -- The term "eligible taxpayer" means any person who makes
37 qualified investment in a new or expanded business facility located in this state and creates at
38 least the required number of new jobs and who is subject to any of the taxes imposed by §11-13-
39 1 *et seq.*, §11-13A-1 et seq., §11-21-1 *et seq.*, §11-23-1 *et seq.* and §11-24-1 *et seq.* of this code
40 (or any combination of those articles). "Eligible taxpayer" shall also include an affiliated group of
41 taxpayers if the group ~~elects to file a consolidated~~ files a combined corporation net income tax
42 return under §11-24-1 *et seq.* of this code.

43 (10) *Expanded facility*. -- The term "expanded facility" means any business facility (other
44 than a new or replacement business facility) resulting from the acquisition, construction,
45 reconstruction, installation or erection of improvements or additions to existing property if the

46 improvements or additions are purchased on or after January 1, 2003, but only to the extent of
47 the taxpayer's qualified investment in the improvements or additions.

48 (11) *Includes and including.* -- The terms "includes" and "including," when used in a
49 definition contained in this article, shall not be considered to exclude other things otherwise within
50 the meaning of the term defined.

51 (12) *Leased property.* -- The term "leased property" does not include property which the
52 taxpayer is required to show on its books and records as an asset under generally accepted
53 principles of financial accounting. If the taxpayer is prohibited from expensing the lease payments
54 for federal income tax purposes, the property shall be treated as purchased property under this
55 section.

56 (13) *New business facility.* -- The term "new business facility" means a business facility
57 which satisfies all the requirements of paragraphs (A), (B), (C) and (D) of this subdivision.

58 (A) The facility is employed by the taxpayer in the conduct of a business the net income
59 of which is or would be taxable under §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code. The facility
60 is not considered a new business facility in the hands of the taxpayer if the taxpayer's only activity
61 with respect to the facility is to lease it to another person or persons.

62 (B) The facility is purchased by, or leased to, the taxpayer on or after January 1, 2003.

63 (C) The facility was not purchased or leased by the taxpayer from a related person. The
64 commissioner may waive this requirement if the facility was acquired from a related party for its
65 fair market value and the acquisition was not tax motivated.

66 (D) The facility was not in service or use during the ninety days immediately prior to
67 transfer of the title to the facility, or prior to the commencement of the term of the lease of the
68 facility: *Provided*, That this ninety-day period may be waived by the commissioner if the
69 commissioner determines that persons employed at the facility may be treated as "new
70 employees" as that term is defined in this subsection.

71 (14) *New employee.* --

72 (A) The term "new employee" means a person residing and domiciled in this state, hired
73 by the taxpayer to fill a position or a job in this state which previously did not exist in the taxpayer's
74 business enterprise in this state prior to the date on which the taxpayer's qualified investment is
75 placed in service or use in this state. In no case may the number of new employees directly
76 attributable to the investment for purposes of this credit exceed the total net increase in the
77 taxpayer's employment in this state: *Provided*, That the commissioner may require that the net
78 increase in the taxpayer's employment in this state be determined and certified for the taxpayer's
79 controlled group: *Provided, however*, That persons filling jobs saved as a direct result of
80 taxpayer's qualified investment in property purchased or leased for business expansion may be
81 treated as new employees filling new jobs if the taxpayer certifies the material facts to the
82 commissioner and the commissioner expressly finds that:

83 (i) But for the new employer purchasing the assets of a business in bankruptcy under
84 chapter seven or eleven of the United States bankruptcy code and the new employer making
85 qualified investment in property purchased or leased for business expansion, the assets would
86 have been sold by the United States bankruptcy court in a liquidation sale and the jobs saved
87 would have been lost; or

88 (ii) But for the taxpayer's qualified investment in property purchased or leased for business
89 expansion in this state, the taxpayer would have closed its business facility in this state and the
90 employees of the taxpayer located at the facility would have lost their jobs: *Provided*, That the
91 commissioner may not make this certification unless the commissioner finds that the taxpayer is
92 insolvent as defined in 11 U.S.C. §101(32) or that the taxpayer's business facility was destroyed,
93 in whole or in significant part, by fire, flood or other act of God.

94 (B) A person is considered to be a "new employee" only if the person's duties in connection
95 with the operation of the business facility are on:

96 (i) A regular, full-time and permanent basis:

97 (l) "Full-time employment" means employment for at least one hundred forty hours per

98 month at a wage not less than the prevailing state or federal minimum wage, depending on which
99 minimum wage provision is applicable to the business;

100 (II) "Permanent employment" does not include employment that is temporary or seasonal
101 and therefore the wages, salaries and other compensation paid to the temporary or seasonal
102 employees will not be considered for purposes of §11-13Q-5 and §11-13Q-5 7 of this code; or

103 (ii) A regular, part-time and permanent basis: *Provided*, That the person is customarily
104 performing the duties at least twenty hours per week for at least six months during the taxable
105 year.

106 (15) *New job*. -- The term "new job" means a job which did not exist in the business of the
107 taxpayer in this state prior to the taxpayer's qualified investment being made, and which is filled
108 by a new employee.

109 (16) *New property*. -- The term "new property" means:

110 (A) Property, the construction, reconstruction or erection of which is completed on or after
111 January 1, 2003, and placed in service or use after that date; and

112 (B) Property leased or acquired by the taxpayer that is placed in service or use in this state
113 on or after January 1, 2003, if the original use of the property commences with the taxpayer and
114 commences after that date.

115 (17) *Original use*. -- The term "original use" means the first use to which the property is
116 put, whether or not the use corresponds to the use of the property by the taxpayer.

117 (18) *Partnership and partner*. -- The term "partnership" includes a syndicate, group, pool,
118 joint venture or other unincorporated organization through or by means of which any business,
119 financial operation or venture is carried on, and which is not a trust or estate, a corporation or a
120 sole proprietorship. The term "partner" includes a member in such a syndicate, group, pool, joint
121 venture or other organization.

122 (19) *Person*. -- The term "person" includes any natural person, corporation or partnership.

123 (20) *Property purchased or leased for business expansion*.

124 (A) *Included property.* — Except as provided in paragraph (B), the term "property
125 purchased or leased for business expansion" means real property and improvements thereto, and
126 tangible personal property, but only if the real or personal property was constructed, purchased,
127 or leased and placed in service or use by the taxpayer, for use as a component part of a new or
128 expanded business facility as defined in this section, which is located within the State of West
129 Virginia. This term includes only:

130 (1) Real property and improvements thereto having a useful life of four or more years,
131 placed in service or use on or after January 1, 2003, by the taxpayer.

132 (2) Real property and improvements thereto, acquired by written lease having a primary
133 term of ten or more years and placed in service or use by the taxpayer on or after January 1,
134 2003.

135 (3) Tangible personal property placed in service or use by the taxpayer on or after January
136 1, 2003, with respect to which depreciation, or amortization in lieu of depreciation, is allowable in
137 determining the personal or corporation net income tax liability of the business taxpayer under
138 §11-21-1 *et seq.* or §11-24-1 *et seq.* of this code, and which has a useful life, at the time the
139 property is placed in service or use in the state, of four or more years.

140 (4) Tangible personal property acquired by written lease having a primary term of four
141 years or longer, that commenced and was executed by the parties thereto on or after January 1,
142 2003, if used as a component part of a new or expanded business facility, shall be included within
143 this definition.

144 (5) Tangible personal property owned or leased, and used by the taxpayer at a business
145 location outside the state which is moved into the State of West Virginia on or after January 1,
146 2003, for use as a component part of a new or expanded business facility located in the state:
147 *Provided,* That if the property is owned, it must be depreciable or amortizable personal property
148 for income tax purposes, and have a useful life of four or more years remaining at the time it is
149 placed in service or use in the state, and if the property is leased, the primary term of the lease

150 remaining at the time the leased property is placed in service or use in the state, must be four or
151 more years.

152 (B) *Excluded property.* — The term "property purchased or leased for business expansion"
153 does not include:

154 (i) Property owned or leased by the taxpayer and for which the taxpayer was previously
155 allowed tax credit under §11-13C-1 *et seq.*, §11-13D-1 *et seq.* or §11-13E-1 *et seq.* of this code,
156 or the tax credits allowed by this article.

157 (ii) Property owned or leased by the taxpayer and for which the seller, lessor, or other
158 transferor, was previously allowed tax credit under §11-13C-1 *et seq.*, §11-13D-1 *et seq.* or §11-
159 13E-1 *et seq.* of this code, or the tax credits allowed by this article.

160 (iii) Repair costs, including materials used in the repair, unless for federal income tax
161 purposes the cost of the repair must be capitalized and not expensed.

162 (iv) Airplanes.

163 (v) Property which is primarily used outside the state, with use being determined based
164 upon the amount of time the property is actually used both within and outside the state.

165 (vi) Property which is acquired incident to the purchase of the stock or assets of the seller,
166 unless for good cause shown, the commissioner consents to waiving this requirement.

167 (vii) Natural resources in place.

168 (viii) Purchased or leased property, the cost or consideration for which cannot be
169 quantified with any reasonable degree of accuracy at the time the property is placed in service or
170 use: *Provided*, That when the contract of purchase or lease specifies a minimum purchase price
171 or minimum annual rent the amount thereof shall be used to determine the qualified investment
172 in the property under §11-13Q-5 8 of this code if the property otherwise qualifies as property
173 purchased or leased for business expansion.

174 (21) *Purchase.* — The term "purchase" means any acquisition of property, but only if:

175 (A) The property is not acquired from a person whose relationship to the person acquiring

176 it would result in the disallowance of deductions under section 267 or 707 (b) of the United States
177 Internal Revenue Code of 1986, as amended, and in effect on January 1, 2003.

178 (B) The property is not acquired by one component member of a controlled group from
179 another component member of the same controlled group. The commissioner can waive this
180 requirement if the property was acquired from a related party for its then fair market value; and

181 (C) The basis of the property for federal income tax purposes, in the hands of the person
182 acquiring it, is not determined:

183 (i) In whole or in part by reference to the federal adjusted basis of the property in the hands
184 of the person from whom it was acquired; or

185 (ii) Under Section 1014 (e) of the United States Internal Revenue Code of 1986, as
186 amended, and in effect on January 1, 2002.

187 (22) *Qualified activity.* -- The term "qualified activity" means any business or other activity
188 subject to any of the taxes imposed by §11-13-1 *et seq.*, §11-13A-1 *et seq.*, §11-21-1 *et seq.*,
189 §11-23-1 *et seq.* or §11-24-1 *et seq.* of this code (or any combination of those articles of this
190 chapter). ~~but does not include the activity of severance or production of natural resources~~

191 (23) *Related person.* -- The term "related person" means:

192 (A) A corporation, partnership, association or trust controlled by the taxpayer;

193 (B) An individual, corporation, partnership, association or trust that is in control of the
194 taxpayer;

195 (C) A corporation, partnership, association or trust controlled by an individual, corporation,
196 partnership, association or trust that is in control of the taxpayer; or

197 (D) A member of the same controlled group as the taxpayer.

198 For purposes of this section, "control," with respect to a corporation, means ownership,
199 directly or indirectly, of stock possessing fifty percent or more of the total combined voting power
200 of all classes of the stock of the corporation entitled to vote. "Control," with respect to a trust,
201 means ownership, directly or indirectly, of fifty percent or more of the beneficial interest in the

202 principal or income of the trust. The ownership of stock in a corporation, of a capital or profits
203 interest in a partnership or association or of a beneficial interest in a trust is determined in
204 accordance with the rules for constructive ownership of stock provided in section 267 (c) of the
205 United States Internal Revenue Code of 1986, as amended, other than paragraph (3) of that
206 section.

207 (24) *Replacement facility.* -- The term "replacement facility" means any property (other
208 than an expanded facility) that replaces or supersedes any other property located within this state
209 that:

210 (A) The taxpayer or a related person used in or in connection with any activity for more
211 than two years during the period of five consecutive years ending on the date the replacement or
212 superseding property is placed in service by the taxpayer; or

213 (B) Is not used by the taxpayer or a related person in or in connection with any qualified
214 activity for a continuous period of one year or more commencing with the date the replacement
215 or superseding property is placed in service by the taxpayer.

216 (25) *Research and development.* -- The term "research and development" means
217 systematic scientific, engineering or technological study and investigation in a field of knowledge
218 in the physical, computer or software sciences, often involving the formulation of hypotheses and
219 experimentation, for the purpose of revealing new facts, theories or principles, or increasing
220 scientific knowledge, which may reveal the basis for new or enhanced products, equipment or
221 manufacturing processes.

222 (A) Research and development includes, but is not limited to, design, refinement and
223 testing of prototypes of new or improved products, or design, refinement and testing of
224 manufacturing processes before commercial sales relating thereto have begun. For purposes of
225 this section, commercial sales includes, but is not limited to, sales of prototypes or sales for market
226 testing.

227 (B) Research and development does not include:

- 228 (i) Market research;
- 229 (ii) Sales research;
- 230 (iii) Efficiency surveys;
- 231 (iv) Consumer surveys;
- 232 (v) Product market testing;
- 233 (vi) Product testing by product consumers or through consumer surveys for evaluation of
- 234 consumer product performance or consumer product usability;
- 235 (vii) The ordinary testing or inspection of materials or products for quality control (quality
- 236 control testing);
- 237 (viii) Management studies;
- 238 (ix) Advertising;
- 239 (x) Promotions;
- 240 (xi) The acquisition of another's patent, model, production or process or investigation or
- 241 evaluation of the value or investment potential related thereto;
- 242 (xii) Research in connection with literary, historical, or similar activities;
- 243 (xiii) Research in the social sciences, economics, humanities or psychology and other
- 244 nontechnical activities; and
- 245 (xiv) The providing of sales services or any other service, whether technical service or
- 246 nontechnical service.
- 247 (26) *Taxpayer*. -- The term "taxpayer" means any person subject to any of the taxes
- 248 imposed by §11-13-1 *et seq.*, §11-13A-1 *et seq.*, §11-21-1 *et seq.*, §11-23-1 *et seq.* or §11-24-1
- 249 *et seq* of this code (or any combination of those articles of this chapter).
- 250 (27) *This code*. -- The term "this code" means the Code of West Virginia, 1931, as
- 251 amended.
- 252 (28) *This state*. -- The term "this state" means the State of West Virginia.
- 253 (29) *Used property*. -- The term "used property" means property acquired after December

254 31, 2002, that is not "new property."

§11-13Q-7. Application of annual credit allowance.

1 (a) *In general.* -- The aggregate annual credit allowance for the current taxable year is an
2 amount equal to the sum of the following:

3 (1) The one-tenth part allowed under §11-13Q-4 of this code for qualified investment
4 placed into service or use during a prior taxable year; plus

5 (2) The one-tenth part allowed under §11-13Q-4 of this code for qualified investment
6 placed into service or use during the current taxable year; plus

7 (3) The one-tenth part allowed under §11-13Q-5 of this code for locating corporate
8 headquarters in this state; or the amount allowed under §11-13Q-10 of this code of the taxable
9 year.

10 (b) *Application of current year annual credit allowance.* -- The amount determined under
11 subsection (a) of this section is allowed as a credit against eighty percent of that portion of the
12 taxpayer's state tax liability which is attributable to and the direct result of the taxpayer's qualified
13 investment, and applied as provided in subsections (c) through ~~(f)~~ (g), both inclusive, of this
14 section, and in that order: *Provided*, That if the median salary of the new jobs is higher than the
15 statewide average nonfarm payroll wage, as determined annually by the West Virginia Bureau of
16 Employment Programs, the amount determined under subsection (a) of this section is allowed as
17 a credit against one hundred percent of that portion of the taxpayers state tax liability which is
18 attributable to and the direct result of the taxpayer's qualified investment, and shall be applied, as
19 provided in subsections (c) through ~~(f)~~ (g), both inclusive, of this section, and in that order.

20 (c) *Business and occupation taxes.* -- That portion of the allowable credit attributable to
21 qualified investment in a business or other activity subject to the taxes imposed under §11-13-2o
22 of this code must first be applied to reduce the taxes imposed or payable under §11-13-2o of this
23 code, for the taxable year (determined before application of allowable credits against tax and the
24 annual exemption). In no case may the credit allowed under this article be applied to reduce any

25 tax imposed or payable under §11-13-2f of this code, or under any other section of §11-13-1 *et*
26 *seq.* of this code except §11-13-2o of this code.

27 (1) If the taxes due under §11-13-2o of this code are not solely attributable to and the
28 direct result of the taxpayer's qualified investment in a business or other activity taxable under
29 that section, the amount of those taxes that are attributable is determined by multiplying the
30 amount of taxes due under that section, for the taxable year (determined before application of any
31 allowable credits against tax and the annual exemption), by a fraction, the numerator of which is
32 all wages, salaries and other compensation paid during the taxable year to all employees of the
33 taxpayer employed in this state, whose positions are directly attributable to the qualified
34 investment in a business or other activity taxable under that section. The denominator of the
35 fraction shall be the wages, salaries and other compensation paid during the taxable year to all
36 employees of the taxpayer employed in this state, whose positions are directly attributable to the
37 business or other activity of the taxpayer that is taxable under §11-13-1 *et seq.* of this code.

38 (2) The annual exemption allowed by §11-13-3 of this code, plus any credits allowable
39 under §11-13D-1 *et seq.*, §11-13E-1 *et seq.*, §11-13R-1 *et seq.* and §11-13S-1 *et seq.* of this
40 code shall be applied against and reduce only the portion of §11-13-1 *et seq.* of this code taxes
41 not apportioned to the qualified investment under this article: *Provided*, That any excess
42 exemption or credits may be applied against the amount of §11-13-1 *et seq.* of this code taxes
43 apportioned to the qualified investment under this article, that is not offset by the amount of annual
44 credit against the taxes allowed under this article for the taxable year, unless their application is
45 otherwise prohibited by this chapter.

46 (d) Severance taxes. –

47 (1) That portion of the allowable credit attributable to qualified investment in a business or
48 other activity subject to the tax imposed by §11-13A-1 *et seq.* of this code must first be applied to
49 reduce up to eighty percent of the taxes imposed by that article for the taxable year (determined
50 before application of any allowable credits against tax).

51 (2) If the taxes due under §11-13A-1 et seq. of this code are not solely attributable to and
52 the direct result of the taxpayer's qualified investment in a business or other activity taxable under
53 that article, the amount of such taxes which are so attributable, shall be determined by multiplying
54 the amount of taxes due under that article for the taxable year (determined before application of
55 any allowable credits against tax), by a fraction, the numerator of which is all wages, salaries and
56 other compensation paid during the taxable year to all employees of the taxpayer employed in
57 this state, whose positions are directly attributable to the qualified investment in a business or
58 other activity taxable under that article. The denominator of the fraction shall be the wages,
59 salaries and other compensation paid during the taxable year to all employees of the taxpayer
60 employed in this state, whose positions are directly attributable to the business or other activity of
61 the taxpayer that is taxable under that article.

62 (3) Any credits allowable under §11-13D-1 et seq. and §11-13E-1 et seq of this code shall
63 be applied against and reduce only the portion of §11-13D-1 et seq. of this code taxes not
64 apportioned to the qualified investment under this article: *Provided*, That any excess credits may
65 be applied against the amount of §11-13A-1 et seq. of this code taxes apportioned to the qualified
66 investment under this article, that is not offset by the amount of annual credit against such taxes
67 allowed under this article for the taxable year, unless their application is otherwise prohibited by
68 this chapter.

69 ~~(d)~~ (e) Business franchise tax. --

70 (1) After application of subsection (c) of this section, any unused allowable credit is next
71 applied to reduce the taxes imposed by §11-23-1 et seq. of this code for the taxable year
72 (determined after application of the credits against tax provided in §11-23-17 of this code but
73 before application of any other allowable credits against tax).

74 (2) If the taxes due under §11-23-1 et seq. of this code are not solely attributable to and
75 the direct result of the taxpayer's qualified investment in a business or other activity taxable under
76 that article for the taxable year, the amount of the taxes which are so attributable are determined

77 by multiplying the amount of taxes due (determined after application of the credits against tax as
78 provided in §11-23-17 of this code, but before application of any other allowable credits), by a
79 fraction, the numerator of which is all wages, salaries and other compensation paid during the
80 taxable year to all employees of the taxpayer employed in this state, whose positions are directly
81 attributable to the qualified investment in a business or other activity taxable under §11-23-1 *et*
82 *seq.* of this code. The denominator of the fraction is wages, salaries and other compensation paid
83 during the taxable year to all employees of the taxpayer employed in this state, whose positions
84 are directly attributable to the business or other activity of the taxpayer that is taxable under §11-
85 23-1 *et seq.* of this code.

86 (3) Any credits allowable under §11-13D-1 *et seq.*, §11-13E-1 *et seq.*, §11-13R-1 *et seq.*
87 and §11-13S-1 *et seq.* of this code are applied against and reduce only the portion of §11-23-1 *et*
88 *seq.* of this code taxes not apportioned to the qualified investment under this article: *Provided,*
89 That any excess exemption or credits may be applied against the amount of §11-23-1 *et seq.* of
90 this code taxes apportioned to the qualified investment under this article that is not offset by the
91 amount of annual credit against those taxes allowed under this article for the taxable year, unless
92 their application is otherwise prohibited by this chapter.

93 ~~(e)~~ (f) *Corporation net income taxes.* --

94 (1) After application of subsections (c) and (d) of this section, any unused credit is next
95 applied to reduce the taxes imposed by §11-24-1 *et seq.* of this code for the taxable year
96 (determined before application of allowable credits against tax).

97 (2) If the taxes due under §11-24-1 *et seq.* of this code (determined before application of
98 allowable credits against tax) are not solely attributable to and the direct result of the taxpayer's
99 qualified investment, the amount of the taxes that is attributable are determined by multiplying the
100 amount of taxes due under that article for the taxable year (determined before application of
101 allowable credits against tax), by a fraction, the numerator of which is all wages, salaries and
102 other compensation paid during the taxable year to all employees of the taxpayer employed in

103 this state whose positions are directly attributable to the qualified investment. The denominator of
104 the fraction is the wages, salaries and other compensation paid during the taxable year to all
105 employees of the taxpayer employed in this state.

106 (3) Any credits allowable under §11-24-1 *et seq.* of this code are applied against and
107 reduce only the amount of §11-24-1 *et seq.* of this code taxes not apportioned to the qualified
108 investment under this article: *Provided*, That any excess credits may be applied against the
109 amount of §11-24-1 *et seq.* of this code taxes apportioned to the qualified investment under this
110 article that is not offset by the amount of annual credit against such taxes allowed under this
111 article for the taxable year, unless their application is otherwise prohibited by this chapter.

112 ~~(f)~~ (g) *Personal income taxes.* --

113 (1) If the person making the qualified investment is an electing small business corporation
114 (as defined in section 1361 of the United States Internal Revenue Code of 1986, as amended), a
115 partnership, a limited liability company that is treated as a partnership for federal income tax
116 purposes or a sole proprietorship, then any unused credit (after application of subsections (c), (d)
117 and (e) of this section) is allowed as a credit against the taxes imposed by §11-21-1 *et seq.* of
118 this code on the income from business or other activity subject to tax under §11-13-1 *et seq.* or
119 §11-23-1 *et seq.* of this code or on income of a sole proprietor attributable to the business.

120 (2) Electing small business corporations, limited liability companies, partnerships and
121 other unincorporated organizations shall allocate the credit allowed by this article among its
122 members in the same manner as profits and losses are allocated for the taxable year.

123 (3) If the amount of taxes due under §11-21-1 *et seq.* of this code (determined before
124 application of allowable credits against tax) that is attributable to business, is not solely
125 attributable to and the direct result of the qualified investment of the electing small business
126 corporation, limited liability company, partnership, other unincorporated organization or sole
127 proprietorship, the amount of the taxes that are so attributable are determined by multiplying the
128 amount of taxes due under §11-21-1 *et seq.* of this code (determined before application of

129 allowable credits against tax), that is attributable to business by a fraction, the numerator of which
130 is all wages, salaries and other compensation paid during the taxable year to all employees of the
131 electing small business corporation, limited liability company, partnership, other unincorporated
132 organization or sole proprietorship employed in this state, whose positions are directly attributable
133 to the qualified investment. The denominator of the fraction is the wages, salaries and other
134 compensation paid during the taxable year to all employees of the taxpayer.

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

137 ~~(g)~~ (h) If the wages, salaries and other compensation fraction formula provisions of
138 subsections (c) through ~~(f)~~ (g) of this section, inclusive, do not fairly represent the taxes solely
139 attributable to and the direct result of qualified investment of the taxpayer the commissioner may
140 require, in respect to all or any part of the taxpayer's businesses or activities, if reasonable:

141 (1) Separate accounting or identification;

142 (2) Adjustment to the wages, salaries and other compensation fraction formula to reflect
143 all components of the tax liability;

144 (3) The inclusion of one or more additional factors that will fairly represent the taxes solely
145 attributable to and the direct result of the qualified investment of the taxpayer and all other project
146 participants in the businesses or other activities subject to tax; or

147 (4) The employment of any other method to effectuate an equitable attribution of the taxes.

148 In order to effectuate the purposes of this subsection, the commissioner may propose for
149 promulgation rules, including emergency rules, in accordance with §29A-3-1 *et seq.* of this code.

150 ~~(h)~~ (i) *Unused credit.* -- If any credit remains after application of subsection (b) of this
151 section, the amount thereof is carried forward to each ensuing tax year until used or until the
152 expiration of the third taxable year subsequent to the end of the initial ten-year credit application
153 period. If any unused credit remains after the thirteenth year, the amount thereof is forfeited. No
154 carryback to a prior taxable year is allowed for the amount of any unused portion of any annual

155 credit allowance.

§11-13Q-19. Business eligible for credit entitlements.

1 (a) Notwithstanding any other provision of this article to the contrary, except as provided
2 in §11-13Q-5 of this code, no entitlement to the economic opportunity tax credit may result from,
3 and no credit is available to any taxpayer for, investment placed in service or use except for
4 taxpayers engaged in the following industries or business activities:

5 (1) Manufacturing, including, but not limited to, chemical processing and chemical
6 manufacturing, manufacture of wood products and forestry products, manufacture of aluminum,
7 manufacture of paper, paper processing, recyclable paper processing, food processing,
8 commercial hydroponic growing of food crops, manufacture of aircraft or aircraft parts,
9 manufacture of automobiles or automobile parts, and all other manufacturing activities, but not
10 timbering or timber severance or timber hauling, or mineral severance, hauling, processing or
11 preparation, or coal severance, hauling, processing or preparation or synthetic fuel manufacturing
12 taxable under §11-13-2f of this code;

13 (2) Information processing, including, but not limited to, telemarketing, information
14 processing, systems engineering, back office operations and software development;

15 (3) The activity of warehousing, including, but not limited to, commercial warehousing and
16 the operation of regional distribution centers by manufacturers, wholesalers or retailers;

17 (4) The activity of goods distribution (exclusive of retail trade);

18 (5) Destination-oriented recreation and tourism; ~~and~~

19 (6) Research and development, as defined in §11-13Q-3 of this code; and

20 (7) Production of natural resources.

21 (b) Notwithstanding the fact that a company, entity or taxpayer is engaged in an industry
22 or business activity enumerated in subsection (a) of this section, the company, entity or taxpayer
23 must qualify for the economic opportunity tax credit by fulfilling the qualified investment, jobs
24 creation and other credit entitlement requirements of this article in order to obtain entitlement to

- 25 any credit under this article. Failure to fulfill the statutory requirements of this article results in a
26 partial or complete loss of the tax credit.

NOTE: The purpose of this bill is to entitle natural resource producers to the economic opportunity tax credit. The bill allows the credit to be used to offset the severance tax. The bill establishes conditions. The bill modifies definitions.

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