WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

House Bill 4205

BY DELEGATES PHILLIPS, MAYNARD, CRISS, STATLER, PAYNTER, AMBLER, LANE, MCGEEHAN, R. MILLER, ELDRIDGE AND DEAN

[Introduced January 19, 2018; Referred to the Committee on Energy then Finance.]

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

Be it enacted by the Legislature of West Virginia:

ARTICLE 13Q. ECONOMIC OPPORTUNITY TAX CREDIT.

§11-13Q-3. Definitions.

(a) *General*. -– When used in this article, or in the administration of this article, terms defined in subsection (b) <u>of this section</u> have the meanings ascribed to them by this section, unless a different meaning is clearly required by either the context in which the term is used, or by specific definition, in this article.

(b) *Terms defined*.

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

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

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

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

West Virginia, or his or her designee.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(14) *New employee*. -–

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

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

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

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

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

(I) "Full-time employment" means employment for at least one hundred forty hours per month at a wage not less than the prevailing state or federal minimum wage, depending on which minimum wage provision is applicable to the business;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) Airplanes.

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

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

(vii) Natural resources in place.

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

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

(A) The property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under section 267 or 707 (b) of the United States Internal Revenue Code of 1986, as amended, and in effect on January 1, 2003.

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

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

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

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

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

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

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

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

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

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

For purposes of this section, "control," with respect to a corporation, means ownership, directly or indirectly, of stock possessing fifty percent or more of the total combined voting power of all classes of the stock of the corporation entitled to vote. "Control," with respect to a trust, means ownership, directly or indirectly, of fifty percent or more of the beneficial interest in the principal or income of the trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association or of a beneficial interest in a trust is determined in accordance with the rules for constructive ownership of stock provided in section 267 (c) of the United States Internal Revenue Code of 1986, as amended, other than paragraph (3) of that section.

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

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

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

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

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

(B) Research and development does not include:

(i) Market research;

(ii) Sales research;

(iii) Efficiency surveys;

(iv) Consumer surveys;

(v) Product market testing;

(vi) Product testing by product consumers or through consumer surveys for evaluation of consumer product performance or consumer product usability;

(vii) The ordinary testing or inspection of materials or products for quality control (quality control testing);

(viii) Management studies;

(ix) Advertising;

(x) Promotions;

(xi) The acquisition of another's patent, model, production or process or investigation or evaluation of the value or investment potential related thereto;

(xii) Research in connection with literary, historical, or similar activities;

(xiii) Research in the social sciences, economics, humanities or psychology and other nontechnical activities; and

(xiv) The providing of sales services or any other service, whether technical service or nontechnical service.

(26) *Taxpayer*. -- The term "taxpayer" means any person subject to any of the taxes imposed by §11-13-1 *et seq*., <u>§11-13A-1 *et seq.,*</u> §11-21-1 *et seq.,* §11-23-1 *et seq. or* §11-24-1 *et seq* of this code (or any combination of those articles of this chapter).

(27) *This code*. -- The term "this code" means the Code of West Virginia, 1931, as amended.

(28) *This state*. -- The term "this state" means the State of West Virginia.

(29) *Used property*. -- The term "used property" means property acquired after December

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

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

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

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

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

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

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

(c) *Business and occupation taxes*. -– That portion of the allowable credit attributable to qualified investment in a business or other activity subject to the taxes imposed under §11-13-2o of this code must first be applied to reduce the taxes imposed or payable under §11-13-2o of this code, for the taxable year (determined before application of allowable credits against tax and the annual exemption). In no case may the credit allowed under this article be applied to reduce any tax imposed or payable under §11-13-2f of this code, or under any other section of §11-13-1 *et seq.* of this code except §11-13-2o of this code.

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

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

(d) *Severance taxes. –*

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

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

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

~~(d)~~ (e) *Business franchise tax*. —

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Separate accounting or identification;

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

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

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

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

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

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

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

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

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

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

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

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

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

<u>(7) Production of natural resources.</u>

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