

Burgos, Alexander N

Subject: FW: [External] Exemption Request of subchapter 05G from the periodic rule review
Attachments: FINAL - Req Exemption from ERR - 17 NCAC 05G.pdf; 26 NCAC 05 .0209.pdf; S.L. 2016-94 excerpt.pdf; S.L. 2019-246 excerpt.pdf

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Sent: Monday, December 16, 2024 4:07 PM

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Subject: [External] Exemption Request of subchapter 05G from the periodic rule review

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Rules Review Commissioners,

Please find the attached signed letter by Secretary Penny requesting exemption of subchapter 05G from the periodic rule review. If you have any questions, please let me know.

Warmest regards,

Michael N. Gossett, Esq., Administrative Officer

Corporate Tax Division

North Carolina Department of Revenue

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Roy Cooper
Governor

Ronald G. Penny
Secretary

December 6, 2024

Office of Administrative Hearings
Rules Review Commission
1711 New Hope Church Road
Raleigh, NC 27609

Re: Request for Exemption for 17 NCAC Subchapter 05G, Market-Based Sourcing for Apportionment of Income, from the 2024-2027 Periodic Review of Existing Rules pursuant to 26 NCAC 05 .0209

Dear Rules Review Commissioners:

On behalf of the North Carolina Department of Revenue Corporate Tax division, I request removal of 17 NCAC Subchapter 05G, Market-Based Sourcing for Apportionment of Income, from the 2024-2027 Periodic Review of Existing Rules. Removal is authorized by and consistent with N.C. Gen. Stat. § 150B-21.3A(d)(1) and Administrative Rule 26 NCAC 05 .0209.

In support of this request for exemption, the Department of Revenue (Department) offers the following:

1. Session Law (S.L.) 2016-94 s. 38.4 enacted Market-based Sourcing principles.
2. Section 38.4(a), of S.L. 2016-94 states, “[n]otwithstanding any provision of Chapter 150B of the General Statutes or any other provision of law prohibiting adoption of rules based on legislation not yet enacted into law, on or before January 20, 2017, the Department of Revenue shall adopt and submit to the Rules Review Commission rules regarding the implementation and administration of market-based sourcing principles as if the proposed statutory changes in subsection (c) of this section was law. In adopting rules pursuant to this subsection, the exemption provided by G.S. 150B-1(d)(4) shall not apply, and the Department shall observe the general provisions of Article 2A of Chapter 150B of the General Statutes, except as follows:
 - a. Notwithstanding G.S. 150B-21.2(f), the agency must accept comments on the text of the proposed rules for at least 90 days after the text is published.
 - b. The provisions of G.S. 150B-21.4 do not apply.
 - c. If House Bill 169 of the 2016 Regular Session of the 2015 General Assembly is enacted, the provisions of G.S. 150B-19.4, as enacted by Section 1.1 of House Bill 169 of the 2016 Regular Session of the 2015 General Assembly, do not apply.”
3. Section 38.4(b) of S.L. 2016-94 continues by adding the following, “[i]n determining whether the rules adopted pursuant to subsection (a) of this section meet the standards for review, the Rules Review Commission shall apply the standards in G.S. 150B-21.9(a) as though the proposed statutory

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changes in subsection (c) of this section were law. If the Commission approves the rules adopted pursuant to subsection (a) of this section, the Commission shall deliver the approved rules to the Codifier of Rules. The Codifier of Rules shall not enter the rules into the Administrative Code until the General Assembly enacts the proposed statutory changes and directs the Codifier to do so. The rules become effective on the date they are entered in the Administrative Code.”

4. The Department adopted the rules regarding the implementation and administration of market-based sourcing principles on January 4, 2017, and submitted the rules to the Rules Review Commission on January 18, 2017.
5. The Rules Review Commission approved and delivered the market-based sourcing rules to the Codifier of Rules on February 16, 2017.
6. Pursuant to Section 38.4(b) of S.L. 2016-94, the Codifier of Rules did not enter the rules into the Administrative Code.
7. Session Law 2019-246, Section 3.(f) states, “[u]nder Section 38.4 of S.L. 2016-94, the Department of Revenue adopted and submitted to the Rules Review Commission rules regarding the implementation and administration of market-based sourcing principles based on legislation proposed in that section. The Department adopted the rules on January 4, 2017, and submitted the rules to the Rules Review Commission on January 18, 2017. The Rules Review Commission approved and delivered the rules to the Codifier of Rules on February 16, 2017. Pursuant to Section 38.4(b) of S.L. 2016-94, the Codifier of Rules did not enter the rules into the Administrative Code. The Codifier of Rules is hereby directed by the General Assembly to enter the rules into the Administrative Code on the effective date of this act, and the rules apply to taxable years beginning on or after January 1, 2020.”
8. The Codifier of Rules entered the market-based sourcing rules into the Administrative Code as 17 NCAC Subchapter 05G with an effective date of January 1, 2020.
9. Pursuant to N.C. Gen. Stat. § 150B-21.3A(c), the Periodic Review of Existing Rules requires covered agencies to review their existing rules at least every 10 years. The purpose of the Periodic Review of Existing Rules is two-fold: (1) to ensure rules are reviewed and dealt with appropriately after review; and (2) to ensure the public has the ability to periodically exercise its Due Process rights to notice and the opportunity to comment on existing rules.
10. During the adoption process of the market-based sourcing rules found in 17 NCAC Subchapter 05G, there was substantial public input including the extended time to “accept comments on the text of the proposed rules for at least 90 days after the text is published” as required by S.L. 2016-94.
11. After publishing the rules for public comment, the Department received comments from several constituent groups that represent a multitude of taxpayers. In response to comments received, when the North Carolina General Assembly enacted market-based sourcing for multistate income tax apportionment as part of S.L. 2019-246, separate sourcing statutes were provided for electric power companies, banks, and wholesale content distributors to accommodate the concerns raised by these specific industries.

12. Exempting the market-based sourcing rules in 17 NCAC Subchapter 05G from the Periodic Review of Existing Rules will have no impact on the regulated public affected by the rules, as the regulated public had ample time to review the rules and provide public comment.
13. Granting the exemption for the market-based sourcing rules in 17 NCAC Subchapter 05G from the Periodic Review of Existing Rules is within the public interest as these rules were effective for taxable years beginning on or after January 1, 2020, and thus the regulated public are familiar with and accustomed to these provisions. Furthermore, because North Carolina's market-based sourcing rules are generally consistent with the rules adopted by the Multistate Tax Commission ("MTC"), multistate taxpayers are able to enjoy the benefit of uniformity of sourcing rules across multiple states that have passed market-based sourcing legislation, thereby easing the burden of navigating different sourcing rules for different states. North Carolina is an Associate Member of the MTC, and the MTC is an intergovernmental state tax agency working on behalf of states and taxpayers to facilitate the equitable and efficient administration of state tax laws that apply to multistate and multinational enterprises. The MTC is charged with promoting uniformity or compatibility in significant components of tax systems.
14. Granting the exemption for the market-based sourcing rules in 17 NCAC Subchapter 05G from the Periodic Review of Existing Rules will assist the Commission, its staff, the Department, and the regulated public by not having to review rules that will remain substantially as adopted when published within the Administrative Code as effective beginning January 1, 2020.
15. Pursuant to N.C. Gen. Stat. § 150B-1(d)(4), Article 2A of this Chapter does not apply to the Department of Revenue, with respect to the notice and hearing requirements.

Based on the above stated reasons, I respectfully request the Commission to grant an exemption pursuant to 26 NCAC 05 .0209, for the market-based sourcing rules in 17 NCAC Subchapter 05G from the Corporate Tax division's Periodic Review of Existing Rules scheduled for July 2025. Representatives from the Department and the Corporate Tax division will be available to answer any questions the Commission has related to this request.

Respectfully submitted,



Ronald G. Penny
Secretary of Revenue

CC: oah.rules@oah.nc.gov

Encl.: Session Law 2016-94, s. 38.4
Session Law 2019-246, s. 3
26 NCAC 05 .0209

26 NCAC 05 .0209 EXEMPTION FROM THE PERIODIC REVIEW OF EXISTING RULES

(a) An agency requesting an exemption from the review pursuant to G.S. 150B-21.3A(d) may make an exemption request for an entire Section, Subchapter, Chapter, or Title of rules if the entire Section, Subchapter, Chapter, or Title of rules were adopted or amended within the previous 10 years prior to the review.

(b) The Commission shall not grant an exemption for individual rules.

(c) The agency head must make the written request to the Commission.

(d) If an agency head submits a request for exemption, the agency shall post notice on its website and notify its interested persons mailing list maintained pursuant to G.S. 150B-21.2(d).

(e) The Commission shall post notice of the agency's request on its website and provide notice of a public hearing.

(f) The Commission shall conduct a public hearing to determine whether it should grant the waiver. The Commission shall consider the following:

- (1) the arguments of the agency;
- (2) public input;
- (3) impact on the regulated public affected by the rule; and
- (4) whether granting the waiver is within the public interest.

(g) If the Commission grants the waiver request, the Section, Subchapter, Chapter, or Title shall be removed from the current schedule and shall not be reviewed under this Section until the new review schedule is set.

History Note: *Authority G.S. 150B-21.3A;*
 Eff. April 1, 2014.

MARKET-BASED SOURCING

SECTION 38.4.(a) Notwithstanding any provision of Chapter 150B of the General Statutes or any other provision of law prohibiting adoption of rules based on legislation not yet enacted into law, on or before January 20, 2017, the Department of Revenue shall adopt and submit to the Rules Review Commission rules regarding the implementation and administration of market-based sourcing principles as if the proposed statutory changes in subsection (c) of this section was law. In adopting rules pursuant to this subsection, the exemption provided by G.S. 150B-1(d)(4) shall not apply, and the Department shall observe the general provisions of Article 2A of Chapter 150B of the General Statutes, except as follows:

- (1) Notwithstanding G.S. 150B-21.2(f), the agency must accept comments on the text of the proposed rules for at least 90 days after the text is published.
- (2) The provisions of G.S. 150B-21.4 do not apply.
- (3) If House Bill 169 of the 2016 Regular Session of the 2015 General Assembly is enacted, the provisions of G.S. 150B-19.4, as enacted by Section 1.1 of House Bill 169 of the 2016 Regular Session of the 2015 General Assembly, do not apply.

SECTION 38.4.(b) In determining whether the rules adopted pursuant to subsection (a) of this section meet the standards for review, the Rules Review Commission shall apply the standards in G.S. 150B-21.9(a) as though the proposed statutory changes in subsection (c) of this section were law. If the Commission approves the rules adopted pursuant to subsection (a) of this section, the Commission shall deliver the approved rules to the Codifier of Rules. The Codifier of Rules shall not enter the rules into the Administrative Code until the General Assembly enacts the proposed statutory changes and directs the Codifier to do so. The rules become effective on the date they are entered in the Administrative Code.

SECTION 38.4.(c) The proposed statutory changes referenced in subsection (a) of this section are as follows:

"§ 105-130.4. Allocation and apportionment of income for corporations.

...

(l) ~~(1) The Sales Factor.~~ – The sales factor is a fraction, the numerator of which is the total sales of the corporation in this State during the income year, and the denominator of which is the total sales of the corporation everywhere during the income year. Notwithstanding any other provision under this Part, the receipts from any casual sale of property shall be excluded from both the numerator and the denominator of the sales factor. Where a corporation is not taxable in another state on its apportionable income but is taxable in another state only because of nonapportionable income, all sales shall be treated as having been made in this State.

Receipts are in this State if the taxpayer's market for the receipts is in this State. If the market for a receipt cannot be determined, the state or states of assignment shall be reasonably approximated. In a case in which a taxpayer cannot ascertain the state or states to which receipts of a sale are to be assigned through the use of a method of reasonable approximation, the receipts must be excluded from the denominator of a taxpayer's sales factor. Except as otherwise provided by this section, a taxpayer's market for receipts is in this State as provided below:

- (1) In the case of sale, rental, lease, or license of real property, if and to the extent the property is located in this State.
- (2) Sales of tangible personal property are in this State if the property is received in this State by the purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser. Direct delivery into this State by the taxpayer to a person or firm designated by a purchaser from within or without the State shall constitute delivery to the purchaser in this State. In the case of rental, lease, or license of tangible personal property, if and to the extent the property is located in this State.
- (3) Other sales are in this State if: In the case of sale of tangible personal property, if and to the extent the property is received in this State by the purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place

at which the goods are ultimately received after all transportation has been completed is considered the place at which the goods are received by the purchaser. Direct delivery into this State by the taxpayer to a person or firm designated by a purchaser from within or without the State constitutes delivery to the purchaser in this State.

- ~~a. The receipts are from real or tangible personal property located in this State; or~~
- ~~b. The receipts are from intangible property and are received from sources within this State; or~~
- ~~c. The receipts are from services and the income-producing activities are in this State.~~
- (4) In the case of sale of a service, if and to the extent the service is delivered to a location in this State.
- (5) In the case of intangible property that is rented, leased, or licensed, if and to the extent the property is used in this State. Intangible property utilized in marketing a good or service to a consumer is "used in this State" if that good or service is purchased by a consumer who is in this State.
- (6) In the case of intangible property that is sold, if and to the extent the property is used in this State. A contract right, government license, or similar intangible property that authorized the holder to conduct a business activity in a specific geographic area is "used in this State" if the geographic area includes all or part of this State. Receipts from a sale of intangible property that is contingent on the productivity, use, or disposition of the intangible property shall be treated as receipts from the rental, lease, or licensing of the intangible property as provided under subdivision (5) of this subsection. All other receipts from a sale of intangible property shall be excluded from the numerator and denominator of the sales factor.

(11) Banks. – A bank's market for receipts is in this State as provided in G.S. 105-130.4A. For purposes of this section, the term "bank" has the same meaning as defined in G.S. 105-130.4A.

...

"§ 105-130.4A. Market-based sourcing for banks.

(a) Definitions. – The definitions in G.S. 105-130.4 apply to this section, and the following definitions apply to this section:

- (1) Bank. – Defined in G.S. 105-130.7B.
- (2) Billing address. – The location indicated in the books and records of the taxpayer on the first day of the taxable year, or on the date in the taxable year when the customer relationship began, as the address where any notice, statement, or billing relating to the customer's account is mailed.
- (3) Borrower, card holder, or payor located in this State. – A borrower, credit card holder, or payor whose billing address is in this State.
- (4) Card issuer's reimbursement fee. – The fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit, debit, or similar type of card has charged merchandise or services to the card.
- (5) Credit card. – A card, or other means of providing information, that entitles the holder to charge the cost of purchases, or a cash advance, against a line of credit.
- (6) Debit card. – A card, or other means of providing information, that enables the holder to charge the cost of purchases, or a cash withdrawal, against the holder's bank account or a remaining balance on the card.
- (7) Loan. – Any extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such an extension of credit from another. The term includes participations, syndications, and leases treated as loans for federal income tax purposes.
- (8) Loan secured by real property. – A loan or other obligation of which fifty percent (50%) or more of the aggregate value of the collateral used to secure the loan or other obligation, when valued at fair market value as of the time the original loan or obligation was incurred, was real property.

- (9) Merchant discount. – The fee, or negotiated discount, charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit, debit, or similar type of card is accepted in payment for merchandise or services sold to the card holder, net of any cardholder chargeback and unreduced by any interchange transaction or issuer reimbursement fee paid to another for charges or purchases made by its cardholder.
- (10) Participation. – An extension of credit in which an undivided ownership interest is held on a prorated basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.
- (11) Payor. – The person who is legally responsible for making payment to the taxpayer.
- (12) Real property owned. – Real property (i) on which the taxpayer may claim depreciation for federal income tax purposes or (ii) to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes or could claim depreciation if subject to federal income tax. Real property does not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure.
- (13) Syndication. – An extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.
- (14) Tangible personal property owned. – Tangible personal property (i) on which the taxpayer may claim depreciation for federal income tax purposes or (ii) to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes could claim depreciation if subject to federal income tax. Tangible personal property does not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure.
- (15) Transportation property. – Vehicles and vessels capable of moving under their own power as well as any equipment or containers attached to such property. Examples of transportation property include aircraft, trains, water vessels, motor vehicles, rolling stock, barges, and trailers.

(b) General Rule. – The receipts factor of a bank is a fraction, the numerator of which is the total receipts of the taxpayer in this State during the income year, and the denominator of which is the total receipts of the taxpayer everywhere during the income year. The method of calculating receipts for purposes of the denominator is the same as the method used in determining receipts for purposes of the numerator. The receipts factor includes only those receipts described herein that are apportionable income for the taxable year. Notwithstanding any other provision under this Part, the receipts from the following are excluded from both the numerator and the denominator of the receipts factor:

- (1) Receipts from a casual sale of property.
- (2) Receipts exempt from taxation.
- (3) The portion of receipts realized from the sale or maturity of securities or other obligations that represents a return of principal.
- (4) Receipts in the nature of dividends subtracted under G.S. 105-130.5(b)(3a) and (3b) and dividends excluded for federal tax purposes.
- (5) The portion of receipts from financial swaps and other similar financial derivatives that represent the notional principal amount that generates the cash flow traded in the swap agreement.

(c) Receipts From the Sale, Lease, or Rental of Real Property. – The numerator of the receipts factor includes receipts from the sale, lease, or rental of real property owned by the taxpayer if the property is located within this State or receipts from the sublease of real property if the property is located within this State.

(d) Receipts From the Sale, Lease, or Rental of Tangible Personal Property. – The method for calculating receipts from the sale, lease, or rental of tangible personal property is as follows:

- (1) Tangible personal property. – Except as provided in subdivision (2) of this subsection, the numerator of the receipts factor includes receipts from the

sale, lease, or rental of tangible personal property owned by the taxpayer if the property is located within this State when it is first placed in service by the lessee.

- (2) Transportation property. – Receipts from the lease or rental of transportation property owned by the taxpayer are included in the numerator of the receipts factor to the extent that the property is used in this State. The extent an aircraft will be deemed to be used in this State and the amount of receipts that is to be included in the numerator of this State's receipts factor is determined by multiplying all the receipts from the lease or rental of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this State and the denominator of which is the total number of landings of the aircraft. If the extent of the use of any transportation property within this State cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

(e) Interest, Fees, and Penalties From Loans Secured by Real Property. – The numerator of the receipts factor includes interest, fees, and penalties from loans secured by real property if the property is located within this State. If the property is located both within this State and one or more other states, the receipts described in this subsection are included in the numerator of the receipts factor if more than fifty percent (50%) of the fair market value of the real property is located within this State. If more than fifty percent (50%) of the fair market value of the real property is not located within any one state, then the receipts described in this subsection are included in the numerator of the receipts factor if the borrower is located in this State. The determination of whether the real property securing a loan is located within this State is made as of the time the original agreement was made and any and all subsequent substitutions of collateral are disregarded.

(f) Interest, Fees, and Penalties From Loans Not Secured by Real Property. – The numerator of the receipts factor includes interest, fees, and penalties from loans not secured by real property if the borrower is located in this State.

(g) Net Gains From the Sale of Loans. – The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans include income recorded under the coupon stripping rules of section 1286 of the Code. The amount of net gains from the sale of loans that is included in the numerator is determined as follows:

- (1) Secured by real property. – The amount of net gains, but not less than zero, from the sale of loans secured by real property is determined by multiplying the net gains by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (e) of this section, and the denominator of which is the total amount of interest, fees, and penalties from loans secured by real property.
- (2) Not secured by real property. – The amount of net gains, but not less than zero, from the sale of loans not secured by real property is determined by multiplying the net gains by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (f) of this section, and the denominator of which is the total amount of interest, fees, and penalties from loans not secured by real property.

(h) Receipts From Interest, Fees, and Penalties from Card Holders. – The numerator of the receipts factor includes interest, fees, and penalties charged to credit, debit, or similar card holders, including annual fees and overdraft fees, if the card holder is located in this State.

(i) Receipts From ATM Fees. – The numerator of the receipts factor includes receipts from fees from the use of an ATM owned or rented by the taxpayer, if the ATM is located in this State. The receipts factor includes all ATM fees that are not forwarded directly to another bank. Receipts from ATM fees that are not sourced under this subsection are sourced pursuant to subsection (l) of this section.

(j) Net Gains From the Sale of Credit Card Receivables. – The numerator of the receipts factor includes net gains, but not less than zero, from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (h) of this section, and the denominator of which is the taxpayer's total amount of interest, fees, and penalties charged to card holders.

(k) Miscellaneous Receipts. – The numerator of the receipts factor includes all of the following:

- (1) Card issuer's reimbursement fees. – Receipts from card issuer's reimbursement fees if the payor is located in this State.
- (2) Receipts from merchant's discount. – Receipts from a merchant discount if the payor is located in this State.
- (3) Loan servicing fees. – Receipts from loan servicing fees if the payor is located in this State.
- (4) Receipts from services. – Receipts from services not otherwise apportioned under this section if the payor is located in this State.
- (5) Receipts from investment assets and activity and trading assets and activity. – Receipts from one or more of the following:
 - a. Interest and dividends from investment assets and activities and trading assets and activities if the payor is located in this State.
 - b. Net gains and other income, but not less than zero, from investment assets and activities and trading assets and activities multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to sub-subdivision a. of this subdivision, and the denominator of which is the taxpayer's total amount of interest and dividends from investment assets and activities and trading assets and activities.

(l) All Other Receipts. – All other receipts not specifically enumerated in this section are included in the numerator of the receipts factor if the payor is located in this State."

SECTION 38.4.(d) If the General Assembly directs the Codifier of Rules to enter the rules into the Administrative Code pursuant to subsection (b) of this section, the Utilities Commission shall adjust the rates for public utilities, excluding water public utilities with less than two hundred thousand dollars (\$200,000) in annual operating revenues, for the tax changes in subsection (c) of this section. Each utility shall calculate the cumulative net effect of the tax changes and file the calculations with proposed rate changes to reflect the net prospective tax changes in utility customer rates within 60 days of the enactment of this section. Any adjustments required to existing tax assets or liabilities reflected in the utility's books and records required by the tax changes shall be deferred and reflected in customer rates in either the utility's next rate case or earlier, if deemed appropriate by the Commission.

SECTION 38.4.(e) This section is effective when it becomes law.

SALES TAX CHANGES

SECTION 38.5.(a) A retailer is not liable for an undercollection of sales or use tax as a result of the changes made under Section 32.18 of S.L. 2015-241 and under Part V of S.L. 2015-259 if the retailer made a good-faith effort to comply with the law and collect the proper amount of tax. This applies only to the period beginning March 1, 2016, and ending December 31, 2016.

SECTION 38.5.(b) G.S. 105-237.1(a) is amended by adding a new subdivision to read:

"(a) Authority. – The Secretary may compromise a taxpayer's liability for a tax that is collectible under G.S. 105-241.22 when the Secretary determines that the compromise is in the best interest of the State and makes one or more of the following findings:

- ...
- (7) The assessment is for sales tax the taxpayer failed to collect or use tax the taxpayer failed to pay as a result of the change in the definition of retailer or the sales tax base expansion to (i) service contracts, (ii) repair, maintenance, and installation services, or (iii) sales transactions for a person in retail trade. The Secretary must determine that the taxpayer made a good-faith effort to comply with the sales and use tax laws. This subdivision applies to assessments for any reporting period beginning March 1, 2016, and ending December 31, 2022."

SECTION 38.5.(c) G.S. 105-164.4H(c) reads as rewritten:

"(c) Erroneous Collection if Separately Stated. – An invoice or other documentation issued to a consumer at the time of the sale by a real property contractor shall not separately state any amount for tax. Any amount for tax separately stated on an invoice or other

including any of its wholly owned noncorporate limited liability companies, primarily engaged in the business of supplying electricity for light, heat, current, or power to persons in this State and that is subject to control of one or more of the following entities: the North Carolina Utilities Commission or the Federal Energy Regulatory Commission.

For purposes of this subsection, the average value of real and tangible personal property owned or rented by an electric power company is determined as follows:

- (1) The average value of property shall be determined by averaging the values at the beginning and end of the income year, but in all cases the Secretary may require the averaging of monthly or other periodic values during the income year if reasonably required to reflect properly the average value of the corporation's property.
- (2) An electric power company that ceases its operations in this State before the end of its income year because of its intention to dissolve or to relinquish its certificate of authority, or because of a merger, conversion, or consolidation, or for any other reason whatsoever shall use the real estate and tangible personal property values as of the first day of the income year and the last day of its operations in this State in determining the average value of property, but the Secretary may require averaging of monthly or other periodic values during the income year if reasonably required to reflect properly the average value of the electric power company's property.
- (3) Property owned by an electric power company is valued at its original cost.
- (4) Property rented by an electric power company is valued at eight times the net annual rental rate.
- (5) Net annual rental rate is the annual rental rate paid by an electric power company less any annual rental rate received by the electric power company from sub-rentals except that sub-rentals shall not be deducted when they constitute apportionable income.
- (6) Any property under construction and any property the income from which constitutes nonapportionable income shall be excluded from the computation of the average value of an electric power company's real and tangible personal property.

...

(t3) State Net Loss Apportionment Election. – Notwithstanding subdivision (l)(4) of this section, a taxpayer with a State net loss balance as of the end of its 2019 taxable year may elect to apportion receipts from services based on the percentage of its income-producing activities performed in this State. The election must be made on the 2020 tax year return and must be in the form prescribed by the Secretary and contain any supporting documentation the Secretary may require. The election is binding and irrevocable until the earlier of the tax year in which (i) the existing State net loss balance is fully utilized or (ii) all of the existing State net loss balance has expired, as determined by applying the limitations set forth in G.S. 105-130.8A(b). A taxpayer must apportion receipts from services in accordance with subdivision (l)(4) of this section for tax years beginning on and after the tax year that the existing State net loss is fully utilized.

For purposes of this subsection, a taxpayer's State net loss balance is the total amount of State net losses computed under G.S. 105-130.8A for taxable years beginning before January 1, 2020, and available to carry forward to taxable years beginning on or after January 1, 2020. A State net loss balance does not include a State net loss created in a taxable year beginning on or after January 1, 2020. A State net loss created in a taxable year beginning on or after January 1, 2020, must be determined using the apportionment rules in G.S. 105-130.4(l)."

SECTION 3.(b) Part 1 of Article 4 of Chapter 105 of the General Statutes is amended by adding a new section to read:

"§ 105-130.4A. Market-based sourcing for wholesale content distributors.

(a) Definitions. – The definitions in G.S. 105-130.4 and the following definitions apply to this section:

- (1) Customer. – A person who has a direct contractual relationship with a wholesale content distributor from whom the wholesale content distributor derives gross receipts, including a business customer such as an advertiser or licensee and an individual customer that directly subscribes with the wholesale content distributor for access to film programming.
- (2) Gross receipts. – The same meaning as the term "sales" in G.S. 105-130.4.
- (3) Wholesale content distributor. – A broadcast television network, a cable program network, or any television distribution company owned by, affiliated with, or under common ownership with any such network. The term does not mean or include a multichannel video programming distributor or a distributor of subscription-based Internet programming services.

(b) Market for Receipts. – The receipts factor of a wholesale content distributor is a fraction, the numerator of which is the sum of the wholesale content distributor's gross receipts from transactions and activity in the regular course of its trade or business from sources within the State and the denominator of which is the sum of the wholesale content distributor's gross receipts from transactions and activity in the regular course of its trade or business everywhere. A wholesale content distributor's receipts from transactions and activities in the regular course of its business, including advertising, licensing, and distribution activities, but excluding receipts from the sale of real property or tangible personal property, are in this State if derived from a business customer whose commercial domicile is in this State. Receipts derived from an individual customer are in this State if the billing address of the individual customer as listed in the broadcaster's books and records is in this State."

SECTION 3.(c) Part 1 of Article 4 of Chapter 105 of the General Statutes is amended by adding a new section to read:

"§ 105-130.4B. Market-based sourcing for banks.

(a) Definitions. – The definitions in G.S. 105-130.4 apply to this section, and the following definitions apply to this section:

- (1) Bank. – Defined in G.S. 105-130.7B.
- (2) Billing address. – The location indicated in the books and records of the taxpayer on the first day of the taxable year, or on the date in the taxable year when the customer relationship began, as the address where any notice, statement, or billing relating to the customer's account is mailed.
- (3) Borrower, cardholder, or payor located in this State. – A borrower, credit cardholder, or payor whose billing address is in this State.
- (4) Card issuer's reimbursement fee. – The fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit, debit, or similar type of card has charged merchandise or services to the card.
- (5) Credit card. – A card, or other means of providing information, that entitles the holder to charge the cost of purchases, or a cash advance, against a line of credit.
- (6) Debit card. – A card, or other means of providing information, that enables the holder to charge the cost of purchases, or a cash withdrawal, against the holder's bank account or a remaining balance on the card.
- (7) Loan. – Any extension of credit resulting from direct negotiations between the taxpayer and its customer, and/or the purchase, in whole or in part, of such an extension of credit from another. The term includes participations, syndications, and leases treated as loans for federal income tax purposes.

- (8) Loan secured by real property. – A loan or other obligation of which fifty percent (50%) or more of the aggregate value of the collateral used to secure the loan or other obligation, when valued at fair market value as of the time the original loan or obligation was incurred, was real property.
- (9) Merchant discount. – The fee, or negotiated discount, charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit, debit, or similar type of card is accepted in payment for merchandise or services sold to the cardholder, net of any cardholder chargeback and unreduced by any interchange transaction or issuer reimbursement fee paid to another for charges or purchases made by its cardholder.
- (10) Participation. – An extension of credit in which an undivided ownership interest is held on a prorated basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.
- (11) Payor. – The person who is legally responsible for making payment to the taxpayer.
- (12) Real property owned. – Real property (i) on which the taxpayer may claim depreciation for federal income tax purposes or (ii) to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes or could claim depreciation if subject to federal income tax. Real property does not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure.
- (13) Syndication. – An extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.
- (14) Tangible personal property owned. – Tangible personal property (i) on which the taxpayer may claim depreciation for federal income tax purposes or (ii) to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes could claim depreciation if subject to federal income tax. Tangible personal property does not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure.
- (15) Transportation property. – Vehicles and vessels capable of moving under their own power as well as any equipment or containers attached to such property. Examples of transportation property include aircraft, trains, water vessels, motor vehicles, rolling stock, barges, and trailers.

(b) General Rule. – The receipts factor of a bank is a fraction, the numerator of which is the total receipts of the taxpayer in this State during the income year, and the denominator of which is the total receipts of the taxpayer everywhere during the income year. The method of calculating receipts for purposes of the denominator is the same as the method used in determining receipts for purposes of the numerator. The receipts factor includes only those receipts described herein that are apportionable income for the taxable year. Notwithstanding any other provision under this Part, the receipts from the following are excluded from both the numerator and the denominator of the receipts factor:

- (1) Receipts from a casual sale of property.
- (2) Receipts exempt from taxation.
- (3) The portion of receipts realized from the sale or maturity of securities or other obligations that represents a return of principal.
- (4) Receipts in the nature of dividends subtracted under G.S. 105-130.5(b)(3a) and (3b) and dividends excluded for federal tax purposes.

- (5) The portion of receipts from financial swaps and other similar financial derivatives that represent the notional principal amount that generates the cash flow traded in the swap agreement.
- (c) Receipts from the Sale, Lease, or Rental of Real Property. – The numerator of the receipts factor includes receipts from the sale, lease, or rental of real property owned by the taxpayer if the property is located within this State or receipts from the sublease of real property if the property is located within this State.
- (d) Receipts from the Sale, Lease, or Rental of Tangible Personal Property. – The method for calculating receipts from the sale, lease, or rental of tangible personal property is as follows:
- (1) Tangible personal property. – Except as provided in subdivision (2) of this subsection, the numerator of the receipts factor includes receipts from the sale, lease, or rental of tangible personal property owned by the taxpayer if the property is located within this State when it is first placed in service by the lessee.
- (2) Transportation property. – Receipts from the lease or rental of transportation property owned by the taxpayer are included in the numerator of the receipts factor to the extent that the property is used in this State. The extent an aircraft will be deemed to be used in this State and the amount of receipts that is to be included in the numerator of this State's receipts factor is determined by multiplying all the receipts from the lease or rental of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this State and the denominator of which is the total number of landings of the aircraft. If the extent of the use of any transportation property within this State cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.
- (e) Interest, Fees, and Penalties from Loans Secured by Real Property. – The numerator of the receipts factor includes interest, fees, and penalties from loans secured by real property if the property is located within this State. If the property is located both within this State and one or more other states, the receipts described in this subsection are included in the numerator of the receipts factor if more than fifty percent (50%) of the fair market value of the real property is located within this State. If more than fifty percent (50%) of the fair market value of the real property is not located within any one state, then the receipts described in this subsection are included in the numerator of the receipts factor if the borrower is located in this State. The determination of whether the real property securing a loan is located within this State is made as of the time the original agreement was made and any and all subsequent substitutions of collateral are disregarded.
- (f) Interest, Fees, and Penalties from Loans Not Secured by Real Property. – The numerator of the receipts factor includes interest, fees, and penalties from loans not secured by real property if the borrower is located in this State.
- (g) Net Gains from the Sale of Loans. – The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans include income recorded under the coupon stripping rules of section 1286 of the Code. The amount of net gains from the sale of loans that is included in the numerator is determined as follows:
- (1) Secured by real property. – The amount of net gains, but not less than zero, from the sale of loans secured by real property is determined by multiplying the net gains by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (e) of this section, and the denominator of which is the total amount of interest, fees, and penalties from loans secured by real property.

(2) Not secured by real property. – The amount of net gains, but not less than zero, from the sale of loans not secured by real property is determined by multiplying the net gains by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (f) of this section, and the denominator of which is the total amount of interest, fees, and penalties from loans not secured by real property.

(h) Receipts from Interest, Fees, and Penalties from Cardholders. – The numerator of the receipts factor includes interest, fees, and penalties charged to credit, debit, or similar cardholders, including annual fees and overdraft fees, if the cardholder is located in this State.

(i) Receipts from ATM Fees. – The numerator of the receipts factor includes receipts from fees from the use of an ATM owned or rented by the taxpayer, if the ATM is located in this State. The receipts factor includes all ATM fees that are not forwarded directly to another bank. Receipts from ATM fees that are not sourced under this subsection are sourced pursuant to subsection (l) of this section.

(j) Net Gains from the Sale of Credit Card Receivables. – The numerator of the receipts factor includes net gains, but not less than zero, from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to subsection (h) of this section, and the denominator of which is the taxpayer's total amount of interest, fees, and penalties charged to cardholders.

(k) Miscellaneous Receipts. – The numerator of the receipts factor includes all of the following:

- (1) Card issuer's reimbursement fees. – Receipts from card issuer's reimbursement fees if the payor is located in this State.
- (2) Receipts from merchant's discount. – Receipts from a merchant discount if the payor is located in this State.
- (3) Loan servicing fees. – Receipts from loan servicing fees if the payor is located in this State.
- (4) Receipts from services. – Receipts from services not otherwise apportioned under this section if the payor is located in this State.
- (5) Receipts from investment assets and activity and trading assets and activity. – Receipts from one or more of the following:
 - a. Interest and dividends from investment assets and activities and trading assets and activities if the payor is located in this State.
 - b. Net gains and other income, but not less than zero, from investment assets and activities and trading assets and activities multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to sub-subdivision a. of this subdivision, and the denominator of which is the taxpayer's total amount of interest and dividends from investment assets and activities and trading assets and activities.

(l) All Other Receipts. – All other receipts not specifically enumerated in this section are included in the numerator of the receipts factor if the payor is located in this State."

SECTION 3.(d) G.S. 105-122(c1) reads as rewritten:

"(c1) Apportionment. – A corporation that is doing business in this State and in one or more other states must apportion its net worth to this State. A corporation must use the apportionment method set out in subdivision (1) of this subsection unless the Department has authorized it to use a different method under subdivision (2) of this subsection. A taxpayer that has made an election under G.S. 105-130.4(t3) must use the apportionment method set out in subdivision (1) of this subsection as if the election had not been made, unless the Department has authorized a different method under subdivision (2) of this subsection. The portion of a corporation's net worth

determined by applying the appropriate apportionment method is considered the amount of net worth the corporation uses in its business in this State:

- (1) Statutory. – A corporation that is subject to income tax under Article 4 of this Chapter must apportion its net worth by using the fraction it applies in apportioning its income under that Article. A corporation that is not subject to income tax under Article 4 of this Chapter must apportion its net worth by using the fraction it would be required to apply in apportioning its income if it were subject to that Article. The apportionment fraction for a wholesale content distributor, as that term is defined in G.S. 105-130.4A, shall not be less than two percent (2%). The apportionment method set out in this subdivision is considered the statutory method of apportionment and is presumed to be the best method of determining the amount of a corporation's capital stock, surplus, and undivided profits attributable to the corporation's business in this State.

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SECTION 3.(e) The Utilities Commission shall adjust the rates for public utilities, excluding water public utilities with less than two hundred thousand dollars (\$200,000) in annual operating revenues, for the tax changes in subsection (a) of this section. Each utility shall calculate the cumulative net effect of the tax changes and file the calculations with proposed rate changes to reflect the net prospective tax changes in utility customer rates within 60 days of the enactment of this act. Any adjustments required to existing tax assets or liabilities reflected in the utility's books and records required by the tax changes shall be deferred and reflected in customer rates in either the utility's next rate case or earlier if deemed appropriate by the Commission.

SECTION 3.(f) Under Section 38.4 of S.L. 2016-94, the Department of Revenue adopted and submitted to the Rules Review Commission rules regarding the implementation and administration of market-based sourcing principles based on legislation proposed in that section. The Department adopted the rules on January 4, 2017, and submitted the rules to the Rules Review Commission on January 18, 2017. The Rules Review Commission approved and delivered the rules to the Codifier of Rules on February 16, 2017. Pursuant to Section 38.4(b) of S.L. 2016-94, the Codifier of Rules did not enter the rules into the Administrative Code. The Codifier of Rules is hereby directed by the General Assembly to enter the rules into the Administrative Code on the effective date of this act, and the rules apply to taxable years beginning on or after January 1, 2020.

The Department of Revenue shall adopt and submit to the Rules Review Commission rules regarding the implementation and administration of market-based sourcing principles, to the extent modifications are needed based on the statutory changes enacted by this section. In adopting rules pursuant to this subsection, the following provisions apply:

- (1) The exemption provided in G.S. 150B-1(d)(4) applies.
- (2) The provisions of G.S. 150B-21.3(b1) and (b2) do not apply.
- (3) The provisions of G.S. 150B-21.4 do not apply.

SECTION 3.(g) Subsections (a) through (d) of this section are effective for taxable years beginning on or after January 1, 2020. The remainder of this section is effective when it becomes law.

MARKETPLACE FACILITATORS TO COLLECT SALES TAX

SECTION 4.(a) G.S. 105-164.3 reads as rewritten:

"§ 105-164.3. Definitions.

The following definitions apply in this Article:

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