

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Department of Revenue

RULE CITATION: 17 NCAC 05G

RECOMMENDATION DATE: January 30, 2025

RECOMMENDED ACTION:

X Deny Request for Exemption from Periodic Review

COMMENT:

I. Request for Exemption

The Department of Revenue has requested that this subchapter, dealing with market-based sourcing for apportionment of income, be exempted from periodic review. It is my opinion that the RRC should deny the requested exemption at this time.

This subchapter was adopted by the Department of Revenue in January of 2017, and approved by the RRC in February of 2017. Pursuant to the underlying statute, the rules were entered into the code and effective in January of 2020.

The periodic review report for this subchapter is currently due in July of 2025. My best guess is that the earliest readoption date these rules would receive is in 2028, although that could certainly be later based on the needs of RRC and the agency.

The purpose of periodic review and readoption under G.S. 150B-21.3A is for agencies to review and readopt their rules at least once every 10 years. If the statute and our processes do not significantly change, and if the exemption were granted, the next periodic review report for these rules would likely be between 2034 and 2037, with a readoption deadline that would likely be at least 2039. This would be approximately 20 years from adoption before the rules were reviewed and readopted. Conversely, under the current deadlines, the report would be due in 2025 and the readoption deadline would likely be 2028 or later, which would already be 12 years after the rules were adopted and 9 years after they were effective. That said, based on the needs of the RRC and the Department of Revenue, it would certainly be possible during the consultation process that staff would recommend a later readoption deadline between 2029 and 2034.

Furthermore, pursuant to G.S. 150B-21.3A(d)(1), if a rule is exempted from review it "must be reviewed in accordance with [the periodic review process] no more than 10 years following the last time the rule was amended." It appears to me that if the exemption were granted, the deadline for review would have to be in 2027, contrary to the desires of the agency.

For those reasons, I recommend that the RRC deny the request for exemption at this time.

Seth Ascher
Commission Counsel

II. Potential for Extension

This situation is complicated by the fact that the legislature has currently indicated that the corporate income tax rate will go to zero in 2030. See S.L. 2021-180 s. 42.2(a). While the legislature could change this timeline, it is worth noting that the corporate tax rate has begun stepping down pursuant to this statute as of the beginning of this year. Once the corporate tax rate goes to zero, these rules will not be prospectively applied. However, the agency does not plan to immediately repeal them as they believe they will remain necessary to resolve audits and other retrospective actions.

As far as I know, this creates a situation that the RRC has not confronted before, where the readoption timelines have the potential to intersect with legislative sunset of these rules. I recommend that the RRC take one of two actions:

- 1. Leave the subchapter as scheduled, with the periodic review report due in July of 2025. This will mean that the agency will be readopting the rules as they prepare to phase them out.*
- 2. Extend the deadline to 2030. This will allow the agency to assess the rules after the legislative change has been implemented and potentially request an exemption if the agency has taken other action on the rules. Note that if an extension is granted, the rules are not exempted, and the rules are ultimately readopted, that process will have to be completed by 2034.*