WEST VIRGINIA CODE CHAPTER 11 ARTICLE 13Q

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§11-13Q-1. Short title.

This article may be cited as the "West Virginia Economic Opportunity Tax Credit Act".

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§11-13Q-2. Legislative finding and purpose.

The Legislature finds that the encouragement of economic opportunity in this state is in the public interest and promotes the general welfare of the people of this state. In order to encourage greater capital investment in businesses in this state and thereby increase economic opportunity in this state, there is hereby enacted the economic opportunity tax credit.

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§11-13Q-3. Definitions.

(a) General. -- When used in this article, or in the administration of this article, terms defined in subsection (b) 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 article thirteen, twenty-one, twenty-three or twenty-four of this chapter (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 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.

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(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 articles thirteen, twenty-one, twenty-three and twenty-four of this chapter (or any combination of those articles). "Eligible taxpayer" shall also include an affiliated group of taxpayers if the group elects to file a consolidated corporation net income tax return under article twenty-four of this chapter.

(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 article twenty-one or twenty-four of this chapter. 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. -–

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(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 sections five and seven of this article; 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

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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 article twenty-one or twenty-four of this chapter, 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,

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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 article thirteen-c, thirteen-d or thirteen-e of this chapter, 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 article thirteen-c, thirteen-d or thirteen-e of this chapter, 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 section eight of this article 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

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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 article thirteen, twenty-one, twenty-three or twenty-four of this chapter (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

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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;

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(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 article thirteen, twenty-one, twenty-three or twenty-four of this chapter (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."

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§11-13Q-4. Amount of credit allowed.

(a) Credit allowed. -- Eligible taxpayers are allowed a credit against the portion of taxes imposed by this state that are attributable to and the consequence of the taxpayer's qualified investment in a new or expanded business in this state, which results in the creation of new jobs. The amount of this credit is determined and applied as provided in this article.

(b) Amount of credit. -- The amount of credit allowable is determined by multiplying the amount of the taxpayer's "qualified investment" (determined under section five or eight, or both) in "property purchased or leased for business expansion" (as defined in section three) by the taxpayer's new jobs percentage (determined under section nine). The product of this calculation establishes the maximum amount of credit allowable under this article due to the qualified investment.

(c) Application of credit over ten years. -- The amount of credit allowable must be taken over a ten-year period, at the rate of one tenth of the amount thereof per taxable year, beginning with the taxable year in which the taxpayer places the qualified investment in service or use in this state, unless the taxpayer elected to delay the beginning of the ten-year period until the next succeeding taxable year. This election shall be made in the annual income tax return filed under this chapter for the taxable year in which qualified investment is first placed into service or use by the taxpayer. Once made, the election cannot be revoked. The annual credit allowance is taken in the manner prescribed in section seven of this article.

(d) Placed in service or use. -- For purposes of the credit allowed by this section, property is considered placed in service or use in the earlier of the following taxable years:

(1) The taxable year in which, under the taxpayer's depreciation practice, the period for depreciation with respect to the property begins; or

(2) The taxable year in which the property is placed in a condition or state of readiness and availability for a specifically assigned function.

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§11-13Q-5. Credit allowed for locating corporate headquarters in this state.

(a) Credit allowed. -- A corporation that presently has its corporate headquarters located outside this state that relocates its corporate headquarters in this state and employs, on a full-time basis, at its new corporate headquarters location, at least fifteen people, who are domiciled in this state, is allowed credit under this article, the amount of which is determined as provided in subsection (b) of this section. The restrictions set forth in subsection (a), section nineteen of this article do not apply to the credit for corporate headquarters relocations allowed under this section.

(b) Determination of credit. -- The amount of credit allowed by subsection (a) is determined, at the election of the taxpayer:

(1) By multiplying the taxpayer's adjusted qualified investment by its new jobs percentage (as determined under section nine of this article); or

(2) By multiplying the taxpayer's adjusted qualified investment by ten percent.

(c) Corporate headquarters relocations after December 31, 2002. -- For purposes of corporate headquarters relocations occurring on or after January 1, 2003, and notwithstanding any other provision of this article to the contrary:

(1) New jobs created in this state by relocation of a corporate headquarters may include jobs created in this state within twelve months before or after the month in which the qualified investment in the corporate headquarters relocation is placed into service or use in this state by:

(A) Relocation or transfer of employees of the corporation or employees of a related corporation or related person from an out-of-state location to the relocated corporate headquarters in this state, who: (i) Are or become employees of the corporation within twelve months before or after the month in which the qualified investment in the corporate headquarters is placed into service or use in this state; and (ii) whose regular place of work is in the corporate headquarters; or

(B) New employees of the corporation whose regular place of work is in the corporate headquarters.

(2) Multiple year projects certified under section six of this article may be allowed for corporate headquarters relocations under this section.

(d) Application of credit. -- The credit allowed by this section is applied in the manner prescribed in section seven of this article: Provided, That the amount of corporation net income taxes against which the credit allowed by this section may be applied is the sum of the corporation net income tax due on adjusted federal taxable income allocated to this state under section seven, article twenty-four of this chapter, plus that portion of the corporation net income tax due on adjusted federal taxable income apportioned to this state under

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section seven, article twenty-four of this chapter, that is further apportioned to the qualified investment using the payroll factor provided in subdivision (1), subsection (h), section seven of this article or an alternative means of apportionment as prescribed by the commissioner under section seven of this article. For all other purposes, the credit allowed by this section is treated as credit allowed by section four of this article.

(e) Definitions. -- For purposes of this section:

(1) Adjusted qualified investment. -- The term "adjusted qualified investment" means the taxpayer's qualified investment in the corporate headquarters as determined under section eight of this article and rules of the commissioner, plus the cost of the reasonable and necessary expenses it incurred to relocate its corporate headquarters at a location in this state from its prior location outside this state.

(2) Corporate headquarters. -- The term "corporate headquarters" means the place at which the corporation has its commercial domicile and from which the business of the corporation is primarily conducted.

(3) Reasonable and necessary expenses incurred to relocate corporate headquarters. -- The phrase "reasonable and necessary expenses incurred to relocate corporate headquarters" means only those expenses incurred and paid by the corporation, to unrelated third parties, to move its corporate headquarters and its corporate headquarters employees to this state that are, upon application by the corporation, determined by the commissioner to have been both reasonable and necessary to effectuate the move.

(4) The corporation. -- For purposes of this section, the term "the corporation" means the corporation for which the corporate headquarters is relocated.

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§11-13Q-6. Credit allowable for certified projects.

(a) In general. -- A multiple year project certified by the commissioner is eligible for the credit allowable by this article. A project eligible for certification under this section is one where the qualified investment under this article creates at least the required minimum number of new jobs but the qualified investment is placed in service or use over a period of up to three successive tax years: Provided, That the qualified investment is made pursuant to a written business facility development plan of the taxpayer providing for an integrated project for investment at one or more new or expanded business facilities, a copy of which must be attached to the taxpayer's application for project certification and approved by the commissioner, and the qualified investment placed in service or use during the first tax year would not have been made without the expectation of making the qualified investment placed in service or use during the next two succeeding tax years;

(b) Application for certification. -- The application for certification of a project under this section shall be filed with and approved by the commissioner prior to any credit being claimed or allowed for the project's qualified investment and new jobs created as a direct result of the qualified investment. This application shall be approved in writing and contain the information as the commissioner may require to determine whether the project should be certified as eligible for credit under this article.

(c) Taking of credit. -– The participant or participants claiming the credit for qualified investments in a certified project shall annually file with their income tax returns filed under this chapter:

(A) Certification that the participant's qualified investment property continues to be used in the project and if disposed of during the tax year, was not disposed of prior to expiration of its useful life;

(B) Certification that the new jobs created by the project's qualified investment continue to exist and are filled by persons who are residents of this state; and

(C) Any other information the commissioner requires to determine continuing eligibility to claim the annual credit allowance for the project's qualified investment.

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§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 section four of this article for qualified investment placed into service or use during a prior taxable year; plus

(2) The one-tenth part allowed under section four of this article for qualified investment placed into service or use during the current taxable year; plus

(3) The one-tenth part allowed under section five of this article for locating corporate headquarters in this state; or the amount allowed under section ten of this article 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), 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), 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 section two-o, article thirteen of this chapter must first be applied to reduce the taxes imposed or payable under section two-o, article thirteen of this chapter, 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 section two-f, or under any other section of article thirteen of this chapter except section two-o.

(1) If the taxes due under section two-o, article thirteen of this chapter are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under section two-o, article thirteen of this chapter, the amount of those taxes that are attributable is determined by multiplying the amount of taxes due under section two-o, article thirteen of this chapter, 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 section

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two-o, article thirteen of this chapter. 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 article thirteen of this chapter.

(2) The annual exemption allowed by section three, article thirteen of this chapter, plus any credits allowable under articles thirteen-d, thirteen-e, thirteen-r and thirteen-s of this chapter, shall be applied against and reduce only the portion of article thirteen taxes not apportioned to the qualified investment under this article: Provided, That any excess exemption or credits may be applied against the amount of article thirteen 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) 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 article twenty-three of this chapter for the taxable year (determined after application of the credits against tax provided in section seventeen of article twenty-three of this chapter, but before application of any other allowable credits against tax).

(2) If the taxes due under article twenty-three of this chapter are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under article twenty-three of this chapter 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 section seventeen, article twenty-three of this chapter, 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 article twenty-three of this chapter. 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 article twenty-three of this chapter.

(3) Any credits allowable under articles thirteen-d, thirteen-e, thirteen-r and thirteen-s of this chapter are applied against and reduce only the portion of article twenty-three taxes not apportioned to the qualified investment under this article: Provided, That any excess exemption or credits may be applied against the amount of article twenty-three 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) Corporation net income taxes. --

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(1) After application of subsections (c) and (d) of this section, any unused credit is next applied to reduce the taxes imposed by article twenty-four of this chapter for the taxable year (determined before application of allowable credits against tax).

(2) If the taxes due under article twenty-four of this chapter (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 article twenty-four of this chapter 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 article twenty-four of this chapter are applied against and reduce only the amount of article twenty-four taxes not apportioned to the qualified investment under this article: Provided, That any excess credits may be applied against the amount of article twenty-four 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) 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 article twenty-one of this chapter on the income from business or other activity subject to tax under article thirteen or twenty-three of this chapter 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 article twenty-one of this chapter (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 article twenty-one of this chapter (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

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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 article twenty-one of this chapter.

(g) If the wages, salaries and other compensation fraction formula provisions of subsections (c) through (f) 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 article three, chapter twenty-nine-a of this code.

(h) 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.

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§11-13Q-8. Qualified investment.

(a) General. -- The qualified investment in property purchased or leased for business expansion is the applicable percentage of the cost of each property purchased or leased for the purpose of business expansion which is placed in service or use in this state by the taxpayer during the taxable year.

(b) Applicable percentage. -- For the purpose of subsection (a), the applicable percentage of any property is determined under the following table:

If useful life is: The applicable percentage is:

Less than 4 years 0%

4 years or more but less than 6 years 33 1/3%

6 years or more but less than 8 years 66 2/3%

8 years or more 100%

The useful life of any property, for purposes of this section, is determined as of the date the property is first placed in service or use in this state by the taxpayer, determined in accordance with such rules and requirements the Tax Commissioner may prescribe.

(c) Cost. -- For purposes of subsection (a), the cost of each property purchased for business expansion is determined under the following rules:

(1) Trade-ins. -- Cost does not include the value of property given in trade or exchange for the property purchased for business expansion.

(2) Damaged, destroyed or stolen property. -- If property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, then the cost of replacement property does not include any insurance proceeds received in compensation for the loss.

(3) Rental property. --

(A) The cost of real property acquired by written lease for a primary term of ten years or longer is one hundred percent of the rent reserved for the primary term of the lease, not to exceed twenty years.

(B) The cost of tangible personal property acquired by written lease for a primary term of:

(i) Four years, or longer, is one third of the rent reserved for the primary term of the lease;

(ii) Six years, or longer, is two thirds of the rent reserved for the primary term of the lease; or

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(iii) Eight years, or longer, is one hundred percent of the rent reserved for the primary term of the lease, not to exceed twenty years: Provided, That in no event may rent reserved include rent for any year subsequent to expiration of the book life of the equipment, determined using the straight-line method of depreciation.

(4) Self-constructed property. -- In the case of self-constructed property, the cost thereof is the amount properly charged to the capital account for depreciation in accordance with federal income tax law.

(5) Transferred property. -- The cost of property used by the taxpayer out-of-state and then brought into this state, is determined based on the remaining useful life of the property at the time it is placed in service or use in this state, and the cost is the original cost of the property to the taxpayer less straight line depreciation allowable for the tax years or portions thereof the taxpayer used the property outside this state. In the case of leased tangible personal property, cost is based on the period remaining in the primary term of the lease after the property is brought into this state for use in a new or expanded business facility of the taxpayer, and is the rent reserved for the remaining period of the primary term of the lease, not to exceed twenty years, or the remaining useful life of the property (determined as aforesaid), whichever is less.

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§11-13Q-9. New jobs percentage.

(a) In general. — The new jobs percentage is based on the number of new jobs created in this state directly attributable to the qualified investment of the taxpayer.

(b) When a job is attributable. -– An employee's position is directly attributable to the qualified investment if:

(1) The employee's service is performed or his or her base of operations is at the new or expanded business facility;

(2) The position did not exist prior to the construction, renovation, expansion, or acquisition of the business facility and the making of the qualified investment; and

(3) But for the qualified investment, the position would not have existed.

(c) Applicable percentage. –

(1) For the purpose of subsection (a) of this section, the applicable new jobs percentage is determined under the following table:

If number of The applicable

new jobs is at least: percentage is:

20 20%

280 25%

520 30%

(2) Provided, That for credit applications filed for taxable years beginning on and after January 1, 2022, for the purpose of subsection (a) of this section, the applicable new jobs percentage is determined under the following table:

If number of The applicable

new jobs is at least: percentage is:

10 10%

20 20%

280 25%

520 30%

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(d) Certification of new jobs. — With the annual return for the applicable taxes filed for the taxable year in which the qualified investment is first placed in service or use in this state, the taxpayer shall estimate and certify the number of new jobs reasonably projected to be created by it in this state within the period prescribed in subsection (f) of this section that are, or will be, directly attributable to the qualified investment of the taxpayer. For purposes of this section, "applicable taxes" means the taxes imposed by §11-13-1, *et seq.*, §11-21-1, *et seq.*, and §11-24-1, *et seq*. of this code against which this credit is applied.

(e) Equivalency of permanent employees. — The hours of part-time employees shall be aggregated to determine the number of equivalent full-time employees for the purpose of this section.

(f) Redetermination of new jobs percentage. — With the annual return for the applicable taxes imposed, filed for the third taxable year in which the qualified investment is in service or use, the taxpayer shall certify the actual number of new jobs created by it in this state that are directly attributable to the qualified investment of the taxpayer.

(1) If the actual number of jobs created would result in a higher new jobs percentage, the credit allowed under this article shall be redetermined and amended returns filed for the first and second taxable years that the qualified investment was in service or use in this state.

(2) If the actual number of jobs created would result in a lower new jobs percentage, the credit previously allowed under this article shall be redetermined and amended returns filed for the first and second taxable years. In applying the amount of redetermined credit allowable for the two preceding taxable years, the redetermined credit shall first be applied to the extent it was originally applied in the prior two years to personal income taxes, then to corporation net income taxes, and, lastly, to business and occupation taxes. Any additional taxes due under this chapter shall be remitted with the amended returns filed with the commissioner, along with interest, as provided in §11-10-17 of this code, and a 10-percent penalty determined on the amount of taxes due with the amended return, which may be waived by the commissioner if the taxpayer shows that the overclaimed amount of the new jobs percentage was due to reasonable cause and not due to willful neglect.

(g) Additional new jobs percentage. –- When the qualified investment is $20 million or more and, if the number of full-time construction laborers and mechanics working at the job site of the new or expanded business facility is 75 or more, or if the number of hours of all construction laborers and mechanics working at the job site is equal to or greater than the number of hours 75 full-time construction laborers and mechanics would have worked at the job site during a 12 consecutive month period, a taxpayer that is allowed a new jobs percentage determined under subsection (a) of this section shall be allowed a new jobs percentage that is five percentage points higher than the new jobs percentage allowed under subsection (a) of this section. In no event may construction laborers and mechanics be used to attain or retain a subsection (a) new jobs percentage. The number of full-time construction laborers and mechanics working at the job site shall be determined by dividing

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the total number of hours worked by all construction laborers and mechanics on a new or expanded business facility during a 12 consecutive month period by 2,080 hours per year. A taxpayer may not claim the additional new jobs percentage allowed by this section unless the taxpayer includes with the certification filed under subsection (d) of this section a certification signed by the general contractor or the construction manager certifying that construction laborers employed at the job site during a consecutive 12 month period aggregated the equivalent of at least 75 full-time employees and the taxpayer has received from the general contractor or construction manager records substantiating the certification, which records shall be retained by the taxpayer for 13 years after the day the expansion to an existing business facility, or the new business facility, is first placed in service or use by the taxpayer. For purposes of this subsection:

(1) The term “construction laborers and mechanics” means those workers, utilized by a contractor or subcontractor at any tier, whose duties are manual or physical in nature, including those workers who use tools or are performing the work of a trade, as distinguished from mental or managerial and working foremen who devote more than 20 percent of their time during a workweek performing the duties of a laborer or mechanic; and

(2) The term “job site” is limited to the physical place or places where the construction called for in the contract will remain when the work on it is completed and nearby property, as described in subdivision (3) of this subsection, used by the contractor or subcontractor during construction that, because of proximity, can reasonably be included in the “site”.

(3) Except as provided in subdivision (4) of this subsection, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters and tool yards are part of the “job site” provided they are dedicated exclusively, or nearly so, to performance of the contract or project and are located in proximity to the actual construction location so that it would be reasonable to include them.

(4) The term “job site” does not include permanent home offices, branch offices, branch plant establishments, fabrication yards or tool yards of a contractor or subcontractor whose locations and continuance in operation are determined without regard to the contract or subcontract for construction of a new or expanded business facility.

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§11-13Q-10. Credit for small business.

(a) Small business defined. — For purposes of this section, the term "small business" means a business which has annual gross receipts of not more than $7 million (including the gross receipts of any affiliates in its controlled group): *Provided*, That beginning January 1, 2004, and on January 1 of each year thereafter, the commissioner shall prescribe an amount that shall apply in lieu of the $7 million amount during that calendar year. This amount is prescribed by increasing the $7 million amount by the cost-of-living adjustment for that calendar year. The requirements for annual gross receipts, once met by a given taxpayer in that taxable year when qualified investment is first placed in service or use, may not again be applied to that same taxpayer in subsequent years to defeat the small business credit to which the taxpayer gained entitlement in that year.

(1) Cost-of-living adjustment. — For purposes of subsection (a) of this section, the cost-of-living adjustment for any calendar year is the percentage (if any) by which the consumer price index for the preceding calendar year exceeds the consumer price index for the calendar year 2002.

(2) Consumer price index for any calendar year. — For purposes of subdivision (1) of this subsection, the consumer price index for any calendar year is the average of the federal consumer price index as of the close of the 12-month period ending on August 31 of that calendar year.

(3) Consumer price index. — For purposes of subdivision (2) of this subsection, the term "Federal Consumer Price Index" means the most recent consumer price index for all urban consumers published by the United States department of labor.

(4) Rounding. — If any increase under subdivision (1) of this subsection is not a multiple of $50, the increase shall be rounded to the next lowest multiple of $50.

(b) Amount of credit allowed. —

(1) Credit allowed. — An eligible small business taxpayer is allowed a credit against the portion of taxes imposed by this state that are attributable to and the direct consequence of the eligible small business taxpayer's qualified investment in a new or expanded business in this state which results in the creation of at least 10 new jobs within 12 months after placing qualified investment into service. The amount of this credit is determined as provided in subdivision (2) of this subsection.

(2) Amount of credit. — The annual amount of credit allowable under this subsection is determined by dividing the amount of the eligible small business taxpayer's "qualified investment" (determined under §11-13Q-8. of this code) in "property purchased for business expansion" (as defined in §11-13Q-3 of this code) by 10. The amount of qualified investment so apportioned to each year of the 10-year credit period is the annual measure against which a taxpayer's annual new jobs percentage (determined under subsection (d) of this section) is

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applied. The product of this calculation establishes the maximum amount of credit allowable each year for 10 consecutive years under this section due to the qualified investment.

(3) Application of credit. — The annual credit allowance shall be taken beginning with the taxable year in which the taxpayer places the qualified investment into service or use in this state, unless the taxpayer elects to delay the beginning of the 10-year credit period until the next succeeding taxable year. This election is made in the annual income tax return filed under this chapter by the taxpayer for the taxable year in which the qualified investment is first placed in service or use. Once made, this election cannot be revoked. The annual credit allowance shall be taken and applied in the manner prescribed in §11-13Q-7 of this code.

(c) New jobs. — The term "new jobs" has the meaning ascribed to it in §11-13Q-3 of this code.

(1) The term "new employee" has the meaning ascribed to it in §11-13Q-3 of this code: *Provided*, That this term does not include employees filling new jobs who:

(A) Are related individuals, as defined in subsection (i), section 51 of the Internal Revenue Code of 1986, or a person who owns 10 percent or more of the business with such ownership interest to be determined under rules set forth in subsection (b), section 267 of said Internal Revenue Code; or

(B) Worked for the taxpayer during the six-month period ending on the date the taxpayer's qualified investment is placed in service or use and is rehired by the taxpayer during the six-month period beginning on the date taxpayer's qualified investment is placed in service or use.

(2) When a job is attributable. — An employee's position is directly attributable to the qualified investment if:

(A) The employee's service is performed or his or her base of operations is at the new or expanded business facility;

(B) The position did not exist prior to the construction, renovation, expansion, or acquisition of the business facility and the making of the qualified investment; and

(C) But for the qualified investment, the position would not have existed.

(d) New jobs percentage. — The annual new jobs percentage is based on the number of new jobs created in this state by the taxpayer directly attributable to taxpayer's qualified investment.

(1) If at least 10 new jobs are created and filled during the taxable year in which the qualified investment is placed in service or use, the applicable new jobs percentage is 10 percent.

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(2) During each of the remaining nine years of the 10-year credit period, the annual new jobs percentage is based on the average number of new jobs filled during that taxable year: *Provided*, That for purposes of estimating the new jobs percentage that will be applicable for each subsequent credit year, the taxpayer shall use the new jobs percentage allowable for the taxable year immediately prior thereto, and in the annual income tax return filed under this chapter for the then current tax year, the taxpayer shall redetermine his or her allowable new jobs percentage for that year based on the average number of new employees employed in new jobs during that year (determined on a monthly basis) created as the direct result of the taxpayer's qualified investment.

(e) Certification of new jobs. — With the annual income tax return filed under this chapter for each taxable year during the 10-year credit period, the taxpayer shall certify:

(1) The new jobs percentage for that taxable year;

(2) The amount of the credit allowance for that year;

(3) If the business is a partnership, limited liability company or electing small business corporation, the amount of credit allocated to the partners, members, or shareholders, as the case may be for that year;

(4) That qualified investment property continue to be used in the business, or if any of it was disposed of during the year the date of disposition and that the property was not disposed of prior to expiration of its useful life, as determined under §11-13Q-8 of this code; and

(5) That the new jobs created by the qualified investment continue to exist and are filled by persons who meet the definition of new employee (as defined in this section).

(f) Small business project. — A small business may apply to the commissioner under §11-13Q-6 of this code for certification as a project if that project will create at least 10 new jobs.

(g) Rules. — The commissioner may prescribe such rules as he or she determines necessary in order to determine the amount of credit allowed under this section to a taxpayer; to verify a taxpayer's continued entitlement to claim the credit; and to verify proper application of the credit allowed.

(h) The commissioner may require a taxpayer intending to claim credit under this section to file with the commissioner a notice of intent to claim this credit, before the taxpayer begins reducing his or her monthly or quarterly installment payments of estimated tax for the credit provided in this section.

(i) Termination of Credit — No credit is allowable under this section to any taxpayer for investment placed in service or use in any tax year beginning on or after January 1, 2022. Taxpayers that have gained lawful entitlement to the credit allowable under this section pursuant to qualified investment placed in service or use prior to January 1, 2022, shall

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retain that entitlement and apply the credit in due course pursuant to the requirements and limitations of this article.

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§11-13Q-10a. Credit allowed for specified high technology manufacturers.

(a) High technology manufacturing business defined. –

For purposes of this section, the term "high technology manufacturing business" means and is limited to only those businesses engaged in a business enumerated in subdivision (1) of this subsection: *Provided*, That for tax years beginning on and after January 1, 2022, the term "high technology manufacturing business" means and is limited to only those businesses engaged in a business enumerated in subdivision (1) or subdivision (2), or both, of this subsection.

(1) "High technology manufacturing business" means a manufacturing activity properly classified as having one or more of the following six-digit North American Industry Classification System code numbers.

North American Industry Classification System Code	**Manufacturing Activity**
Computer & Peripheral Equipment	
334111	Electronic Computers
334112	Computer Storage Devices
Electronic Components	
334411	Electron Tubes
334414	Electronic Capacitors
Semiconductors	
334413	Semiconductor & Related Devices
333295	Semiconductor Machinery

(2) "High technology manufacturing business" means, in addition to those activities enumerated in subdivision (1) of this subsection:

(A) The activity of manufacturing drones, target drones, unmanned aircraft or unmanned robotic aircraft,

(B) The activity of manufacturing autonomous motor vehicles,

(C) The activity of manufacturing robots, robotic medical machines or equipment or robotic surgical machines or equipment,

(D) The activity of manufacturing machines, equipment and products predominantly

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operated by and incorporating artificial intelligence.

(E) The activity of manufacturing biotechnology products.

(F) The activity of manufacturing medical devices.

(3) Definitions – For purposes of this section.

(A) Artificial Intelligence — For purposes of this section "artificial intelligence" means computers and computer systems that, by design and function, perform tasks that would typically require human intelligence, including decision-making, visual perception, speech recognition, or translation of one human language into another human language.

(B) Autonomous — For purposes of this section "autonomous" means that set of characteristics of a machine which taken as a whole cause the machine to be capable of performing designated tasks without immediate direct or explicit human control or intervention beyond initial programming and preliminary set up and initiation.

(C) Autonomous Motor Vehicle — For purposes of this section, The term "autonomous motor vehicle" means a motor vehicle that conforms to Level 3, level 4 or level 5 of the Society of Automotive Engineers automation level definitions specified in SAE International Standard J3016.

(D) Biotechnology

(i) "Biotechnology" means scientific invention, processes and methods, or industrial invention, processes and methods, based on the science of biology, microbiology, molecular biology, cellular biology, biochemistry, or biophysics, or any combination thereof. Biotechnology includes, but is not limited to, recombinant DNA techniques, genetics and genetic engineering, cell fusion techniques, and bioprocesses, using living organisms, or parts of organisms.

(ii) Biotechnology does not include farming, agriculture, or animal or apiary husbandry, or the production of any crop or agricultural product by traditional growing processes or by hydroponic growing processes, or fish farming, or the raising or growing or production of fish or any aquatic animal or product.

(iii) Biotechnology does not include zymurgy, wine making, brewing, preparation of yeast used in food production or preparation, or any food or drink preparation or production.

(E) "Biotechnology product" means any virus, therapeutic serum, antibody, protein, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, or analogous product produced through the application of biotechnology that is used in the prevention, treatment, or cure of diseases or injuries to humans, animals, or plants.

(F) Drone – For purposes of this section "drone" means an unmanned aircraft that may be

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controlled either remotely or by an autonomous system, which may work with internal systemic sensors or ground positioning satellite systems, or both.

(G) “Medical device” means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, that is:

(i) Recognized in the national formulary or any supplement thereof, or the United States pharmacopeia, or any supplement thereof;

(ii) Intended for use in the diagnosis of disease, or in the cure, mitigation, treatment, or prevention of disease or other conditions in human beings or animals; or

(iii) Intended to affect the structure or any function of the body of human beings or animals, and which does not achieve any of its primary intended purposes through chemical action within or on the body of human beings or animals and which is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

(H) Program – For purposes of this section “program” means a set of instructions that can be executed by a computer, or other machine or device to perform calculations, processes or operations, or a combination thereof, to execute a specific task or series of tasks.

(I) Robot – For purposes of this section “robot” means a programmable machine, for which operating instructions are typically derived from computer programming, which machine is: (i) Capable of performing operations and processes involving physical movement; (ii) designed to operate with a degree of autonomy; (iii) capable of processing data and information, including data or information derived from visual perception or other physical perceptions; and (iv) capable of engaging in intelligent behavior derived from artificial intelligence.

(b) Amount of credit allowed.

(1) Credit allowed. — An eligible high technology manufacturing business taxpayer is allowed a credit against the portion of taxes imposed by this state that are attributable to and the direct consequence of the eligible high technology manufacturing business taxpayer’s qualified investment in a new or expanded high technology manufacturing business in this state which results in the creation of at least 20 new jobs within 12 months after placing qualified investment into service. The amount of this credit is determined as provided in this section.

(2) Amount of credit. — The annual amount of credit allowable under this subsection is 100 percent of the tax attributable to qualified investment, for each consecutive year of a 20-year credit period.

(3) Application of credit. — The annual credit allowance shall be taken beginning with the taxable year in which the taxpayer places the qualified investment into service or use in this

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state, unless the taxpayer elects to delay the beginning of the 20-year credit period until the next succeeding taxable year. This election is made in the annual income tax return filed under this chapter by the taxpayer for the taxable year in which the qualified investment is first placed in service or use. Once made, this election cannot be revoked. The annual credit allowance shall be taken and applied against the taxes enumerated in §11-13Q-7 of this code. The credit shall offset 100 percent of tax attributable to qualified investment and shall be applied for a period of 20 consecutive years without carryover.

(c) New jobs. — The term "new jobs" has the meaning ascribed to it in §11-13Q-3 of this code.

(1) The term "new employee" has the meaning ascribed to it in §11-13Q-3 of this code: *Provided*, That this term does not include employees filling new jobs who:

(A) Are related individuals, as defined in subsection (i), section 51 of the Internal Revenue Code of 1986, or a person who owns 10 percent or more of the business with such ownership interest to be determined under rules set forth in subsection (b), section 267 of the Internal Revenue Code of 1986; or

(B) Worked for the taxpayer during the six-month period ending on the date the taxpayer's qualified investment is placed in service or use and is rehired by the taxpayer during the six-month period beginning on the date taxpayer's qualified investment is placed in service or use.

(2) When a job is attributable. — An employee's position is directly attributable to the qualified investment if:

(A) The employee's service is performed or his or her base of operations is at the new or expanded business facility;

(B) The position did not exist prior to the construction, renovation, expansion, or acquisition of the business facility and the making of the qualified investment;

(C) But for the qualified investment, the position would not have existed; and

(D) The median compensation of the new jobs attributable to the qualified investment is greater than $45,000 per year: *Provided*, That this median compensation amount shall be adjusted for inflation each year in accordance with the provisions of this section.

(3) Median compensation adjusted for inflation. — The median compensation requirements applicable to high technology manufacturing business taxpayers for purposes of this section, shall be adjusted for inflation by application of a cost-of-living adjustment. The adjusted median compensation amount shall be applicable, as adjusted, each year throughout the 20-year credit period. Failure of a taxpayer entitled to credit under this section to meet the median compensation requirement for any year will result in forfeiture of the credit for that year. However, if in any succeeding year within the original 20 year credit period, the

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taxpayer pays a median compensation to its employees which exceeds the inflation adjusted median compensation amount for that year, the taxpayer shall regain entitlement to take the credit for that year only. No credit forfeited in a prior year shall be taken, and the tax year or years to which the forfeited credit would have been applied shall be forfeited and deducted from the remainder of the years over which the credit can be taken.

(A) Cost-of-living adjustment. — For purposes of this section, the cost-of-living adjustment for any calendar year is the percentage, if any, by which the consumer price index for the preceding calendar year exceeds the consumer price index for the calendar year 2007.

(B) Consumer price index for any calendar year. — For purposes of this section, the consumer price index for any calendar year is the average of the federal consumer price index as of the close of the 12-month period ending on August 31 of such calendar year.

(C) Consumer price index. — For purposes of this section, the term "Federal Consumer Price Index" means the last consumer price index for all urban consumers published by the United States Department of Labor.

(D) Rounding. — If any increase in the median compensation amount under this section is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(d) Credit exclusion. —

(1) Any taxpayer that has taken the credit against tax authorized under this section shall not be eligible for application of the credit allowed under any other section of this article during the twenty year credit period authorized by this section for the same qualified investment on which credit allowed by this article was taken.

(2) Any taxpayer that has taken the credit against tax authorized under this section may not take the credit authorized under any other provision of this code for the same qualified investment on which credit allowed by this article was taken.

(e) Rules. — The commissioner may prescribe such rules as he or she determines necessary in order to determine the amount of credit allowed under this section to a taxpayer; to verify a taxpayer's continued entitlement to claim the credit; and to verify proper application of the credit allowed.

(f) Notices and reports. — The commissioner may require a taxpayer intending to claim credit under this section to file with the commissioner a notice of intent to claim this credit before the taxpayer begins reducing his or her monthly or quarterly installment payments of estimated tax for the credit provided in this section.

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§11-13Q-11. Forfeiture of unused tax credits; redetermination of credit allowed.

(a) Disposition of property or cessation of use. -- If during any taxable year, property with respect to which a tax credit has been allowed under this article:

(1) Is disposed of prior to the end of its useful life, as determined under section eight of this article; or

(2) Ceases to be used in an eligible business of the taxpayer in this state prior to the end of its useful life, as determined under section eight of this article, then the unused portion of the credit allowed for the property is forfeited for the taxable year and all ensuing years. Additionally, except when the property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, the taxpayer shall redetermine the amount of credit allowed in all earlier years by reducing the applicable percentage of cost of the property allowed under section eight of this article, to correspond with the percentage of cost allowable for the period of time that the property was actually used in this state in the new or expanded business of the taxpayer. The taxpayer shall then file a reconciliation statement for the year in which the forfeiture occurs and pay any additional taxes owed due to reduction of the amount of credit allowable for the earlier years, plus interest and any applicable penalties. The reconciliation statement shall be filed with the annual return for the primary tax for which the taxpayer is liable under articles thirteen and twenty-three of this chapter.

(b) Cessation of operation of business facility. -- If during any taxable year the taxpayer ceases operation of a business facility in this state for which credit was allowed under this article, before expiration of the useful life of property with respect to which tax credit has been allowed under this article, then the unused portion of the allowed credit is forfeited for the taxable year and for all ensuing years. Additionally, except when the cessation is due to fire, flood, storm or other casualty, the taxpayer shall redetermine the amount of credit allowed in earlier years by reducing the applicable percentage of cost of the property allowed under section eight of this article, to correspond with the percentage of cost allowable for the period of time that the property was actually used in this state in a business of the taxpayer that is taxable under article thirteen, twenty-three or twenty-four of this chapter, or in the case of a sole proprietorship, article twenty-one of this chapter. The taxpayer shall then file a reconciliation statement with the annual return for the primary tax for which the taxpayer is liable under articles thirteen, twenty-one or twenty-three of this chapter, for the year in which the forfeiture occurs, and pay any additional taxes owed due to the reduction of the amount of credit allowable for the earlier years, plus interest and any applicable penalties.

(c) Reduction in number of employees. -- If during any taxable year subsequent to the taxable year in which the new jobs percentage is redetermined as provided in section nine of this article, the average number of employees of the taxpayer, for the then current taxable year, employed in positions created because of and directly attributable to the qualified investment falls below the minimum number of new jobs created upon which the taxpayer's annual credit allowance is based, the taxpayer shall calculate what his or her annual credit

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allowance would have been had his or her new jobs percentage been determined based upon the average number of employees, for the then current taxable year, employed in positions created because of and directly attributable to the qualified investment. The difference between the result of this calculation and the taxpayer's annual credit allowance for the qualified investment as determined under section four of this article, is forfeited for the then current taxable year, and for each succeeding taxable year unless for a succeeding taxable year the taxpayer's average employment in positions directly attributable to the qualified investment once again meets the level required to enable the taxpayer to utilize its full annual credit allowance for that taxable year.

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§11-13Q-12. Recapture of credit; recapture tax imposed.

(a) When recapture tax applies. --

(1) Any person who places qualified investment property in service or use and who fails to use the qualified investment property for at least the period of its useful life (determined as of the time the property was placed in service or use), or the period of time over which tax credits allowed under this article with respect to the property are applied under this article, whichever period is less, and who reduces the number of its employees filling new jobs in its business in this state, which were created and are directly attributable to the qualified investment property, after the third taxable year in which the qualified investment property was placed in service or use, or fails to continue to employ individuals in all the new jobs created as a direct result of the qualified investment property and used to qualify for the credit allowed by this article, prior to the end of the tenth taxable year after the qualified investment property was placed in service or use, the person shall pay the recapture tax imposed by subsection (b) of this section.

(2) This section does not apply when section thirteen of this article applies. However, the successor, or the successors, and the person, or persons, who previously claimed credit under this article with respect to the qualified investment property and the new jobs attributable thereto, are jointly and severally liable for payment of any recapture tax subsequently imposed under this section with respect to the qualified investment property and new jobs.

(b) Recapture tax imposed. --

The recapture tax imposed by this subsection is the amount determined as follows:

(1) Full recapture. -- If the taxpayer prematurely removes qualified investment property placed in service (when considered as a class) from economic service in the taxpayer's qualified investment business activity in this state, and the number of employees filling the new jobs created by the person falls below the number of new jobs required to be created in order to qualify for the amount of credit being claimed, the taxpayer shall recapture the amount of credit claimed under section seven of this article for the taxable year, and all preceding taxable years, on qualified investment property which has been prematurely removed from service. The amount of tax due under this subdivision is an amount equal to the amount of credit that is recaptured under this subdivision.

(2) Partial recapture. -- If the taxpayer prematurely removes qualified investment property from economic service in the taxpayer's qualified investment business activity in this state, and the number of employees filling the new jobs created by the person remains twenty or more, but falls below the number necessary to sustain continued application of credit determined by use of the new job percentage upon which the taxpayer's one-tenth annual credit allowance was determined under section four or section ten of this article, taxpayer shall recapture an amount of credit equal to the difference between:

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(A) The amount of credit claimed under section seven of this article for the taxable year, and all preceding taxable years; and

(B) The amount of credit that would have been claimed in those years if the amount of credit allowable under section four or ten of this article had been determined based on the qualified investment property which remains in service using the average number of new jobs filled by employees in the taxable year for which recapture occurs. The amount of tax due under this subdivision is an amount equal to the amount of credit that is recaptured under this subdivision.

(3) Additional recapture. -- If after a partial recapture under subdivision (2) of this subsection, the taxpayer further reduces the number of employees filling new jobs, the taxpayer shall recapture an additional amount determined as provided under subdivision (1) of this subsection. The amount of tax due under this subdivision is an amount equal to the amount of credit that is recaptured under this subdivision.

(c) Recapture of credit allowed for projects. -- The commissioner may file in the West Virginia register an emergency legislative rule explaining how the provisions of this section are applied in the case of projects certified under section six of this article.

(d) Payment of recapture tax. -- The amount of tax recaptured under this section is due and payable on the day the person's annual return is due for the taxable year in which this section applies, under article twenty-one or twenty-four of this chapter. When the employer is a partnership, limited liability company or S corporation for federal income tax purposes, the recapture tax shall be paid by those persons who are partners in the partnership, members in the company, or shareholders in the S corporation, in the taxable year in which recapture occurs under this section.

(e) Rules. -- The commissioner may promulgate such rules as may be useful or necessary to carry out the purpose of this section and to implement the intent of the Legislature. Rules shall be promulgated in accordance with the provisions of article three, chapter twenty-nine-a of this code.

WV Legislature

§11-13Q-13. Transfer of qualified investment to successors.

(a) Mere change in form of business. -- Property may not be treated as disposed of under section eleven of this article, by reason of a mere change in the form of conducting the business as long as the property is retained in the successor business in this state, and the transferor business retains a controlling interest in the successor business. In this event, the successor business is allowed to claim the amount of credit still available with respect to the business facility or facilities transferred, and the transferor business may not be required to redetermine the amount of credit allowed in earlier years.

(b) Transfer or sale to successor. -- Property is not treated as disposed of under section eleven of this article by reason of any transfer or sale to a successor business which continues to operate the business facility in this state. Upon transfer or sale, the successor shall acquire the amount of credit that remains available under this article for each subsequent taxable year and the transferor business is not required to redetermine the amount of credit allowed in earlier years.

WV Legislature

§11-13Q-14. Identification of investment credit property.

Every taxpayer who claims credit under this article shall maintain sufficient records to establish the following facts for each item of qualified property:

(1) Its identity;

(2) Its actual or reasonably determined cost;

(3) Its straight-line depreciation life;

(4) The month and taxable year in which it was placed in service;

(5) The amount of credit taken; and

(6) The date it was disposed of or otherwise ceased to be qualified property.

WV Legislature

§11-13Q-15. Failure to keep records of investment credit property.

A taxpayer who does not keep the records required for identification of investment credit property is subject to the following rules:

(1) A taxpayer is treated as having disposed of, during the taxable year, any investment credit property which the taxpayer cannot establish was still on hand, in this state, at the end of that year.

(2) If a taxpayer cannot establish when investment credit property reported for purposes of claiming this credit returned during the taxable year was placed in service, the taxpayer is treated as having placed it in service in the most recent prior year in which similar property was placed in service, unless the taxpayer can establish that the property placed in service in the most recent year is still on hand. In that event, the taxpayer will be treated as having placed the returned property in service in the next most recent year.

WV Legislature

§11-13Q-16. Interpretation and construction.

(a) No inference, implication or presumption of legislative construction or intent may be drawn or made by reason of the location or grouping of any particular section, provision or portion of this article; and no legal effect may be given to any descriptive matter or heading relating to any section, subsection or paragraph of this article.

(b) The provisions of this article shall be reasonably construed in order to effectuate the legislative intent recited in section two of this article.

WV Legislature

§11-13Q-17. Severability.

(a) If any provision of this article or the application thereof is for any reason adjudged by any court of competent jurisdiction to be invalid, the judgment may not affect, impair or invalidate the remainder of the article, but shall be confined in its operation to the provision thereof directly involved in the controversy in which the judgment shall have been rendered, and the applicability of the provision to other persons or circumstances may not be affected thereby.

(b) If any provision of this article or the application thereof is made invalid or inapplicable by reason of the repeal or any other invalidation of any statute therein addressed or referred to, such invalidation or inapplicability may not affect, impair or invalidate the remainder of the article, but shall be confined in its operation to the provision thereof directly involved with, pertaining to, addressing or referring to the statute, and the application of the provision with regard to other statutes or in other instances not affected by any such repealed or invalid statute may not be abrogated or diminished in any way.

WV Legislature

§11-13Q-18. Burden of proof; application required; failure to make timely application.

(a) The burden of proof is on the taxpayer to establish by clear and convincing evidence that the taxpayer is entitled to the benefits allowed by this article.

(b) Application for credit required. --

(1) Application required. -- Notwithstanding any provision of this article to the contrary, no credit is allowed or may be applied under this article for any qualified investment property placed in service or use until the person asserting a claim for the allowance of credit under this article makes written application to the commissioner for allowance of credit as provided in this subsection. An application for credit shall be filed, in the form prescribed by the Tax Commissioner, no later than the last day for filing the tax returns, determined by including any authorized extension of time for filing the return, required under article twenty-one or twenty-four of this chapter for the taxable year in which the property to which the credit relates is placed in service or use and all information required by the form shall be provided.

(2) Failure to make timely application. -- The failure to timely apply for the credit results in the forfeiture of fifty percent of the annual credit allowance otherwise allowable under this article. This penalty applies annually until the application is filed.

WV Legislature

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

(a) Notwithstanding any other provision of this article to the contrary, except as provided in section five of this article, 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 section two-f, article thirteen of this chapter;

(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 section three of this article.

(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.

WV Legislature

§11-13Q-20. Tax credit review and accountability.

(a) Beginning on February 1, 2006, and every third year thereafter, the commissioner shall submit to the Governor, the President of the Senate and the Speaker of the House of Delegates a tax credit review and accountability report evaluating the cost effectiveness of the economic opportunity credit during the most recent three-year period for which information is available. The criteria to be evaluated shall include, but not be limited to, for each year of the three-year period:

(1) The numbers of taxpayers claiming the credit;

(2) The net number of new jobs created by all taxpayers claiming the credit;

(3) The cost of the credit;

(4) The cost of the credit per new job created; and

(5) Comparison of employment trends for an industry and for taxpayers within the industry that claim the credit.

(b) Taxpayers claiming the credit shall provide any information the Tax Commissioner may require to prepare the report: Provided, That the information provided is subject to the confidentiality and disclosure provisions of sections five-d and five-s, article ten of this chapter.

(c) On or before February 1, 2013, the Department of Commerce, in consultation with the Tax Commissioner, the Department of Transportation and the Department of Environmental Protection shall submit to the Governor, the President of the Senate and the Speaker of the House of Delegates a report of the impact of all the tax credits and other economic incentives provided in the act of the Legislature which amended and reenacted this section during 2011 upon economic development in this state, including but not limited to the creation of jobs in this state, upon the state's infrastructure, including but not limited to the need for construction or maintenance of the roads and highways of the state, upon the natural resources of the state, and upon public and private property interests in the state.

WV Legislature

§11-13Q-21. Effective date; election; notice of claim or election under transition rules.

(a) The credit allowed by this article is allowed for qualified investment placed in service or use on or after January 1, 2003, subject to the rules contained in this section.

(b) Election. -- Notwithstanding the general rule stated in subsection (a), the taxpayer may elect to apply the credit allowed under article thirteen-c of this chapter in lieu of the credit allowed by this article to property purchased or leased for business expansion that is placed in service or use on or after January 1, 2003, if the property qualifies for credit under the transition rules set forth in subdivision (2), subsection (c), section sixteen, article thirteen-c of this chapter.

(c) Notice of election required. –- Any person intending to make the election allowed in subsection (b) of this section shall file written notice of his or her intention with the Tax Commissioner on or before December 31, 2002. In the case of a multiparticipant project, this notice may be filed by the managing project participant on behalf of all participants in the project. The notice shall be in a form prescribed by the Tax Commissioner and all information required by the form shall be provided.

(d) Failure to file notice. -- If any person fails to timely file the notice required by subsection (c) of this section, that person is precluded from claiming credit under article thirteen-c of this chapter for property placed in service or use after December 31, 2002, and may claim credit under this article to the extent the credit is allowable under this article. For purposes of this section, notice, in proper and complete form, timely filed under section sixteen, article thirteen-c of this chapter fulfills the filing requirement of this section if that filing addresses the same qualified investment for which notice would be required under this section.

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§11-13Q-22. Credit available for taxpayers which do not satisfy the new jobs percentage requirement.

(a) Notwithstanding any provision of this article to the contrary, a taxpayer engaged in one or more of the industries or business activities specified in §11-13Q-19 of this code which does not satisfy the new jobs percentage requirement prescribed in §11-13Q-9(c) of this code but which otherwise fulfills the requirements prescribed in this article, is permitted to claim a credit against the taxes specified in §11-13Q-7 of this code in the order so specified that are attributable to and the consequence of the taxpayer's business operations in this state which result in the creation of net new jobs. Credit under this section is allowed in the amount of $3,000 per year, per new job created and filled by a new employee, as those terms are defined in §11-13Q-3 of this code for a period of five consecutive years beginning in the tax year when the new employee is first hired. In no case may the number of new employees determined for purposes of this section exceed the total net increase in the taxpayer's employment in this state. Credit allowed under this section shall be allowed beginning in the tax year when the new employee is first hired: *Provided*, That each new job:

(1) Pays at least $32,000 annually. Beginning January 1, 2010, and on January 1 of each year thereafter, the commissioner shall prescribe an amount that shall apply in lieu of the $32,000 amount during that calendar year. This amount is prescribed by increasing the $32,000 figure by the cost-of-living adjustment for that calendar year;

(2) Provides health insurance and may offer benefits including child care, retirement or other benefits; and

(3) Is a full-time, permanent position, as those terms are defined in section three of this article.

(b) Jobs that pay less than $32,000 annually, or less than the amount prescribed by the commissioner pursuant to subdivision (1) of subsection (a) of this section, whichever is higher, or that pay that salary but do not also provide benefits in addition to the salary do not qualify for the credit authorized by this section. Jobs that are less than full-time, permanent positions do not qualify for the credit authorized by this section.

The employer having obtained entitlement to the credit shall not be required to raise wages of employees currently employed in jobs upon which the initial credit was based by reason of the cost-of-living adjustment.

(c) For purposes of this section, the following definitions apply:

(1) Cost-of-living adjustment. — For purposes of subsection (a) of this section, the cost-of-living adjustment for any calendar year is the percentage (if any) by which the consumer price index for the preceding calendar year exceeds the consumer price index for the calendar year 2009.

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(2) Consumer price index for any calendar year. — For purposes of subdivision (1) subsection (a) of this section, the consumer price index for any calendar year is the average of the federal consumer price index as of the close of the twelve-month period ending on August 31 of that calendar year.

(3) Consumer price index. — For purposes of subdivision (2) of this subsection, the term "federal consumer price index" means the most recent consumer price index for all urban consumers published by the United States Department of Labor.

(4) Rounding. — If any increase under subdivision (1) of this subsection is not a multiple of $50, the increase shall be rounded to the next lowest multiple of $50.

(d) Unused credit remaining in any tax year after application against the taxes specified in section seven of this article is forfeited and does not carry forward to any succeeding tax year and does not carry back to a prior tax year.

(e) The tax credit authorized by this section may be taken in addition to any credits allowable under §11-13C-1 *et seq.*, §11-13D-1 *et seq.*, §11-13E-1 *et seq.*, §11-13F-1 *et seq.*, §11-13G-1 *et seq.*, §11-13J-1 *et seq.*, §11-13R-1 *et seq.*, or §11-13S-1 *et seq.* of this code. However, any taxpayer that is taking, or that has taken, any credit against tax authorized under this article may not take the credit authorized under any other provision of this code for the same qualified investment on which credit allowed by this article was taken.

(f) Reduction in number of employees credit forfeiture. — If, during the year when a new job was created for which credit was granted under this section or during any of the next succeeding four tax years thereafter, net jobs that are attributable to and the consequence of the taxpayer's business operations in this state decrease, counting both new jobs for which credit was granted under this section and preexisting jobs, then the total amount of credit to which the taxpayer is entitled under this section shall be decreased and forfeited in the amount of $3,000 for each net job loss.

(g) Amendments to this section enacted during the 2021 regular session of the Legislature shall be effective for tax years beginning on or after January 1, 2022.

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