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SENATE BILL NO. 883

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Appropriations
on February 27, 2018)

(Patron Prior to Substitute—Senator Stanley)

A BILL to amend and reenact §§ 58.1-405, 58.1-408, 58.1-417, 58.1-418, 58.1-419, 58.1-420, 58.1-422, 58.1-422.1, and 58.1-422.2 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 15.2-958.2:01 and 58.1-405.1, relating to income tax; modification for certain companies; local grants.

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-405, 58.1-408, 58.1-417, 58.1-418, 58.1-419, 58.1-420, 58.1-422, 58.1-422.1, and 58.1-422.2 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 15.2-958.2:01 and 58.1-405.1 as follows:

§ 15.2-958.2:01. Grants for certain corporations and pass-through entities.

A. The counties and cities listed in subsection B may give grants or loans to any eligible company, as defined in § 58.1-405.1.

B. The counties and cities that may give grants pursuant to subsection A are:

1. The Counties of Alleghany, Bland, Buchanan, Carroll, Craig, Dickenson, Giles, Grayson, Lee, Russell, Scott, Smyth, Tazewell, Washington, Wise, and Wythe and the Cities of Bristol, Galax, and Norton;

2. The Counties of Amelia, Appomattox, Buckingham, Charlotte, Cumberland, Halifax, Henry, Lunenburg, Mecklenburg, Nottoway, Patrick, Pittsylvania, and Prince Edward and the Cities of Danville and Martinsville;

3. The Counties of Accomack, Caroline, Essex, Gloucester, King and Queen, King William, Lancaster, Mathews, Middlesex, Northampton, Northumberland, Richmond, and Westmoreland; and

4. The Counties of Brunswick and Dinwiddie and the City of Petersburg.

§ 58.1-405. Corporations transacting or conducting entire business within this Commonwealth.

Except as provided in § 58.1-405.1, if the entire business of the corporation is transacted or conducted within the Commonwealth, the tax imposed by this chapter shall be upon the entire Virginia taxable income of such corporation for each taxable year; however, if such corporation is certified by the Virginia Economic Development Partnership Authority as an eligible company pursuant to § 58.1-405.1, it may elect to (i) apportion its income between qualified localities, as defined in § 58.1-405.1, and other localities in the Commonwealth, provided that it shall not apportion any of its income to a state other than Virginia and (ii) utilize any modification for which it may be eligible pursuant to the provisions of § 58.1-408, 58.1-417, 58.1-418, 58.1-419, 58.1-420, 58.1-422, 58.1-422.1, or 58.1-422.2, as applicable. The entire business of the corporation shall be deemed to have been transacted or conducted within the Commonwealth if such corporation is not subject in any other state to a net income tax, a franchise tax measured by net income, or a franchise tax for the privilege of doing business.

§ 58.1-405.1. Eligibility of companies for apportionment modification; certification by the Virginia Economic Development Partnership Authority.

A. For purposes of this section:

"Authority" means the Virginia Economic Development Partnership Authority.

"Eligible company" means a corporation or pass-through entity, as defined in § 58.1-390.1, that does not have any existing property or payroll in Virginia as of January 1, 2018, and on or after January 1, 2018, but before January 1, 2023, (i) either (a) spends at least \$5 million on new capital investment in a qualified locality or qualified localities and creates at least 10 new jobs in a qualified locality or qualified localities or (b) creates at least 50 new jobs in a qualified locality or qualified localities; (ii) is a traded-sector company; and (iii) is certified by the Authority as generating a positive fiscal impact pursuant to subsection B.

"New capital investment" means real property acquired in a qualified locality or qualified localities on or after January 1, 2018, but before January 1, 2023, and any improvements to real property in a qualified locality or qualified localities on or after January 1, 2018, but before January 1, 2023.

"New job" means a permanent, full-time position of indefinite duration that pays at least twice the minimum wage, as defined in the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.), and that requires a minimum of (i) 35 hours of an employee's time a week for the entire normal year of the eligible company's operations, which normal year shall consist of at least 48 weeks, or (ii) 1,680 hours per year.

"Qualified development site" means real property that is in a locality adjacent to a qualified locality

60 and, before January 1, 2018, either (i) was owned or partly owned by a qualified locality or an
61 industrial development authority of which a qualified locality is a member or (ii) was owned or partly
62 owned by a locality or industrial development authority, was leased to a private party, and was subject
63 to a revenue-sharing agreement providing that a portion of the revenues from the lease would be
64 distributed to a qualified locality. "Qualified development site" does not include real property that is not
65 owned by the Commonwealth or a political subdivision thereof.

66 "Qualified locality" means (i) the County of Alleghany, Bland, Buchanan, Carroll, Craig, Dickenson,
67 Giles, Grayson, Lee, Russell, Scott, Smyth, Tazewell, Washington, Wise, or Wythe or the City of Bristol,
68 Galax, or Norton; (ii) the County of Amelia, Appomattox, Buckingham, Charlotte, Cumberland, Halifax,
69 Henry, Lunenburg, Mecklenburg, Nottoway, Patrick, Pittsylvania, or Prince Edward or the City of
70 Danville or Martinsville; (iii) the County of Accomack, Caroline, Essex, Gloucester, King and Queen,
71 King William, Lancaster, Mathews, Middlesex, Northampton, Northumberland, Richmond, or
72 Westmoreland; or (iv) the County of Brunswick or Dinwiddie or the City of Petersburg. "Qualified
73 locality" includes a qualified development site.

74 "Traded-sector company" means a company that directly or indirectly derives more than 50 percent
75 of its revenue from out-of-state sources.

76 B. 1. The Authority shall determine whether a company will generate a positive fiscal impact based
77 on the following factors: (i) job creation; (ii) private capital investment; and (iii) anticipated additional
78 state and local tax revenue. The Authority also shall consider the additional revenue the Commonwealth
79 likely would expend in and for the localities if the economy in the localities continues to erode. In
80 making its determination, the Authority shall consult with the Department regarding the revenue impact
81 of certifying such company. The Authority shall certify a company only if it determines such company
82 will generate a positive fiscal impact.

83 2. The Authority shall deny certification to any company if it determines such taxpayer has engaged
84 in a merger, acquisition, similar business combination, name change, change in business form, or other
85 transaction the primary purpose of which is to obtain status as an eligible company.

86 3. Any certification issued pursuant to subdivision B 1 shall be subject to annual renewal.

87 C. Any eligible company may elect to apportion its income pursuant to the provisions of § 58.1-408,
88 58.1-417, 58.1-418, 58.1-419, 58.1-420, 58.1-422, 58.1-422.1, or 58.1-422.2, as applicable. However, if
89 the entire business of an eligible company is transacted or conducted within the Commonwealth, it shall
90 not apportion its income pursuant to this subsection but may elect to apportion its income pursuant to
91 the provisions of § 58.1-405.

92 **§ 58.1-408. What income apportioned and how.**

93 A. The Virginia taxable income of any corporation, except those subject to the provisions of
94 § 58.1-417, 58.1-418, 58.1-419, 58.1-420, 58.1-422, 58.1-422.1, or 58.1-422.2, excluding income
95 allocable under § 58.1-407, shall be apportioned to the Commonwealth by multiplying such income by a
96 fraction, the numerator of which is the property factor plus the payroll factor, plus twice the sales factor,
97 and the denominator of which is four; however, where the sales factor does not exist, the denominator
98 of the fraction shall be the number of existing factors and where the sales factor exists but the payroll
99 factor or the property factor does not exist, the denominator of the fraction shall be the number of
100 existing factors plus one.

101 B. Any eligible company, as defined in § 58.1-405.1, may subtract the value of its property acquired
102 in any qualified locality or qualified localities, as defined in § 58.1-405.1, on or after January 1, 2018,
103 and payroll attributable to jobs created on or after January 1, 2018, in any of such localities, from the
104 numerator of the corresponding factor. Such eligible company may make such modification for the
105 taxable year in which it first becomes eligible and for the four subsequent, consecutive taxable years,
106 except for any year in which the eligible company's (i) total, cumulative new capital investment falls
107 below the applicable initial threshold or (ii) number of new jobs falls below the applicable initial
108 threshold.

109 **§ 58.1-417. Motor carriers; apportionment.**

110 A. Motor carriers of property or passengers shall apportion their net apportionable income to this
111 Commonwealth by the use of the ratio of vehicle miles in this Commonwealth to total vehicle miles of
112 the corporation everywhere. For the purposes of this section the words "vehicle miles" in the case of
113 motor carriers of property shall mean miles traveled by vehicles (whether owned or operated by the
114 corporation) hauling property for a charge or traveling on a scheduled route. In the case of motor
115 carriers of passengers the same shall mean miles traveled by vehicles (whether owned or operated by the
116 corporation) carrying passengers for a fare or traveling on a scheduled route.

117 B. The provisions of subsection A shall not be applicable to a carrier:

118 1. Which neither owns nor rents real or tangible personal property within this Commonwealth, except
119 vehicles, which has made no pick-ups or deliveries within this Commonwealth, and which has traveled
120 less than 50,000 vehicle miles in this Commonwealth in the taxable year; or

121 2. Which neither owns nor rents any real or tangible personal property within this Commonwealth,

except vehicles, and which makes no more than twelve round trips into this Commonwealth during a taxable year.

The mileage traveled under 50,000 miles or the mileage traveled in such round trips, however, may not represent more than 5 percent of the total miles annually traveled in all states by such carrier.

C. Any eligible company, as defined in § 58.1-405.1, may subtract its vehicle miles traveled in any qualified locality or qualified localities, as defined in § 58.1-405.1, during the taxable year from the numerator of the ratio in subsection A. Such eligible company may make such modification for the taxable year in which it first becomes eligible and for the four subsequent, consecutive taxable years, except for any year in which the eligible company's (i) total, cumulative new capital investment falls below the applicable initial threshold or (ii) number of new jobs falls below the applicable initial threshold.

§ 58.1-418. Financial corporations; apportionment.

A. The Virginia taxable income of a financial corporation, as defined herein, excluding income allocable under § 58.1-407, shall be apportioned within and without this Commonwealth in the ratio that the business within this Commonwealth is to the total business of the corporation. Business within this Commonwealth shall be based on cost of performance in the Commonwealth over cost of performance everywhere.

B. "Financial corporation" means any corporation not exempted from the imposition of tax under the provisions of § 58.1-401, which derives more than seventy percent of its gross income from the classes of income enumerated in subdivisions 1 through 4 below, without reference to the state wherein such income is earned, including but not limited to small loan companies, sales finance companies, brokerage companies and investment companies:

1. Fees, commissions, other compensation for financial services rendered;
2. Gross profits from trading in stocks, bonds, or other securities;
3. Interest; and
4. Dividends received to the extent included in Virginia taxable income.

C. In computing the amounts referred to in subdivisions 1 through 4 of subsection B of this section, any amount received by a member of an affiliated group, determined under § 1504(a) of the Internal Revenue Code but without reference to whether any such corporation is an includable corporation under § 1504(b) of the Internal Revenue Code, from another member of such group shall be included only to the extent such amount exceeds expenses of the recipient directly related thereto.

D. Any eligible company, as defined in § 58.1-405.1, may subtract the value of its business within any qualified locality or qualified localities, as defined in § 58.1-405.1, during the taxable year from the numerator of the ratio in subsection A. Such eligible company may make such modification for the taxable year in which it first becomes eligible and for the four subsequent, consecutive taxable years, except for any year in which the eligible company's (i) total, cumulative new capital investment falls below the applicable initial threshold or (ii) number of new jobs falls below the applicable initial threshold.

§ 58.1-419. Construction corporations; apportionment.

A. Construction companies which have elected to report income on the completed contract basis shall apportion income within and without this Commonwealth in the ratio that the business within the Commonwealth is to the total business of the corporation.

B. All other construction corporations not reporting under the completed contract method shall determine Virginia taxable income by reference to §§ 58.1-406 through 58.1-416.

C. Any eligible company, as defined in § 58.1-405.1, may subtract the value of its business within any qualified locality or qualified localities, as defined in § 58.1-405.1, during the taxable year from the numerator of the ratio in subsection A. Such eligible company may make such modification for the taxable year in which it first becomes eligible and for the four subsequent, consecutive taxable years, except for any year in which the eligible company's (i) total, cumulative new capital investment falls below the applicable initial threshold or (ii) number of new jobs falls below the applicable initial threshold.

§ 58.1-420. Railway companies; apportionment.

A. Notwithstanding the provisions of § 58.1-408, railway companies shall determine their net apportionable income to the Commonwealth by multiplying the Virginia taxable income of such company, excluding the classes of income allocable under § 58.1-407, by the use of the ratio of revenue car miles in the Commonwealth to total revenue car miles of the company everywhere. For the purposes of this section, "revenue car mile" in the case of railway carriers of property or passengers means the movement of a unit of loaded car equipment a distance of one mile. The loaded car miles shall be determined in accordance with the Uniform System of Accounts for Railroad Companies of the Interstate Commerce Commission.

B. Any eligible company, as defined in § 58.1-405.1, may subtract its revenue car miles traveled in

183 *any qualified locality or qualified localities, as defined in § 58.1-405.1, during the taxable year from the*
184 *numerator of the ratio in subsection A. Such eligible company may make such modification for the*
185 *taxable year in which it first becomes eligible and for the four subsequent, consecutive taxable years,*
186 *except for any year in which the eligible company's (i) total, cumulative new capital investment falls*
187 *below the applicable initial threshold or (ii) number of new jobs falls below the applicable initial*
188 *threshold.*

189 **§ 58.1-422. Manufacturing companies; apportionment.**

190 A. For taxable years beginning on or after July 1, 2011, the Virginia taxable income of a
191 manufacturing company, excluding income allocable under § 58.1-407, may be apportioned within and
192 without the Commonwealth as provided in § 58.1-408 or as follows:

193 1. From July 1, 2011, until July 1, 2013, by multiplying such income by a fraction, the numerator of
194 which is the property factor plus the payroll factor plus triple the sales factor and the denominator of
195 which is five, except when the sales factor does not exist, the denominator of the fraction shall be the
196 number of existing factors, and when the sales factor exists but the payroll factor or property factor does
197 not exist, the denominator of the fraction shall be the number of existing factors plus two;

198 2. From July 1, 2013, until July 1, 2014, by multiplying such income by a fraction, the numerator of
199 which is the property factor plus the payroll factor plus quadruple the sales factor and the denominator
200 of which is six, except when the sales factor does not exist, the denominator of the fraction shall be the
201 number of existing factors, and when the sales factor exists but the payroll factor or property factor does
202 not exist, the denominator of the fraction shall be the number of existing factors plus three; and

203 3. From July 1, 2014, and thereafter, by multiplying such income by the sales factor.

204 B. If the taxpayer makes one or more of the elections described in subdivision A 1, A 2, or A 3, the
205 taxpayer may not revoke the election for a period of three taxable years.

206 In addition, the taxpayer shall certify to the Department that the average weekly wage of its full-time
207 employees is greater than the lower of the state or local average weekly wages for the taxpayer's
208 industry.

209 C. If the average annual number of full-time employees of a manufacturing company for the first
210 three taxable years (in which the manufacturing company used the alternative apportionment set forth in
211 this section) is less than 90 percent of the base year employment, or the average wage of its full-time
212 employees as certified by the taxpayer is not greater than the lower of the state or local average weekly
213 wage, then the Department of Taxation shall assess the manufacturing company with additional taxes
214 pursuant to this article computed as the difference between (i) the taxes that would have been due under
215 the apportionment formula provided under § 58.1-408 for such three taxable years, minus (ii) the taxes
216 due under the alternative apportionment provided under this section for such three taxable years. Interest
217 shall accrue and shall be assessed on such additional taxes at the rate prescribed under § 58.1-15, with
218 such interest accruing from the original due date for filing of the income tax return to the date of
219 payment of such additional taxes.

220 Such additional taxes and interest are hereby imposed on manufacturing companies using the
221 alternative apportionment set forth in this section.

222 D. As used in this section, unless the context requires another meaning:

223 "Base year employment" means the average number of full-time employees employed by the
224 manufacturing company in the Commonwealth in the taxable year that ended immediately prior to the
225 first taxable year in which the manufacturing company used the alternative apportionment set forth in
226 this section.

227 "Full-time employee" means an employee of a manufacturing company who is employed for an
228 indefinite duration in the Commonwealth for which the standard fringe benefits are paid by the
229 manufacturing company, for which employment requires a minimum of either (i) 35 hours of an
230 employee's time per week for the entire normal year of such manufacturing company's operations, which
231 "normal year" shall consist of at least 48 weeks, or (ii) 1,680 hours per year.

232 "Manufacturing company" means a domestic or foreign corporation primarily engaged in activities
233 that, in accordance with the North American Industrial Classification System (NAICS), United States
234 Manual, United States Office of Management and Budget, 1997 Edition, would be included in Sector
235 11, 31, 32, or 33.

236 E. The General Assembly of Virginia finds that job creation is essential to the continued fiscal health
237 of the Commonwealth. In this modern economy, states often compete for quality manufacturing jobs.
238 Accordingly, the provisions of this section relating to manufacturing companies that increase their
239 employment in Virginia are integral to the purpose of the election allowed pursuant to this section. If
240 any provision of this section is for any reason held to be invalid or unconstitutional by the decision of a
241 court of competent jurisdiction, that provision shall not be deemed severable.

242 F. Any eligible company, as defined in § 58.1-405.1, that elects to apportion its income pursuant to
243 subsection A may subtract the value of its sales in any qualified locality or qualified localities, as
244 defined in § 58.1-405.1, during the taxable year from the numerator of the ratio in subdivision A 3.

Such eligible company may make such modification for the taxable year in which it first becomes eligible and for the four subsequent, consecutive taxable years, except for any year in which the eligible company's (i) total, cumulative new capital investment falls below the applicable initial threshold or (ii) number of new jobs falls below the applicable initial threshold.

§ 58.1-422.1. Retail companies; apportionment.

A. For taxable years beginning on or after July 1, 2012, the Virginia taxable income of a retail company, excluding income allocable under § 58.1-407, shall be apportioned within and without the Commonwealth as follows:

1. From July 1, 2012, until July 1, 2014, by multiplying such income by a fraction, the numerator of which is the property factor plus the payroll factor plus triple the sales factor and the denominator of which is five, except that when the sales factor does not exist, the denominator of the fraction shall be the number of existing factors, and when the sales factor exists but the payroll factor or property factor does not exist, the denominator of the fraction shall be the number of existing factors plus two;

2. From July 1, 2014, until July 1, 2015, by multiplying such income by a fraction, the numerator of which is the property factor plus the payroll factor plus quadruple the sales factor and the denominator of which is six, except that when the sales factor does not exist, the denominator of the fraction shall be the number of existing factors, and when the sales factor exists but the payroll factor or property factor does not exist, the denominator of the fraction shall be the number of existing factors plus three; and

3. From July 1, 2015, and thereafter, by multiplying such income by the sales factor.

B. As used in this section, "retail company" means a domestic or foreign corporation primarily engaged in activities that, in accordance with the North American Industry Classification System (NAICS), United States Manual, United States Office of Management and Budget, 1997 Edition, would be included in Sectors 44-45.

C. *Any eligible company, as defined in § 58.1-405.1, may subtract the value of its sales in any qualified locality or qualified localities, as defined in § 58.1-405.1, during the taxable year from the numerator of the ratio in subdivision A 3. Such eligible company may make such modification for the taxable year in which it first becomes eligible and for the four subsequent, consecutive taxable years, except for any year in which the eligible company's (i) total, cumulative new capital investment falls below the applicable initial threshold or (ii) number of new jobs falls below the applicable initial threshold.*

§ 58.1-422.2. Apportionment; taxpayers with enterprise data center operations.

A. For taxable years beginning on or after July 1, 2016, the Virginia taxable income of taxpayers with enterprise data center operations, excluding income allocable under § 58.1-407, shall be apportioned within and without the Commonwealth as follows:

1. From July 1, 2016, until July 1, 2017, by multiplying such income by a fraction, the numerator of which is the property factor plus the payroll factor plus quadruple the sales factor and the denominator of which is six, except that when the sales factor does not exist, the denominator of the fraction shall be the number of existing factors, and when the sales factor exists but the payroll factor or property factor does not exist, the denominator of the fraction shall be the number of existing factors plus three; and

2. From July 1, 2017, and thereafter, by multiplying such income by the sales factor.

B. As used in this section:

"Enterprise data center operations" means operations that (i) physically house information technology equipment such as servers, switches, routers, data storage devices, or related equipment; (ii) manage and process digital data and information to provide application services or management for data processing, such as web hosting, Internet, intranet, telecommunication, and information technology; (iii) are developed and owned by the taxpayer; and (iv) are operated by the taxpayer or any of its affiliates substantially for their own use.

C. The provisions of this section requiring an apportionment formula for taxpayers with enterprise data center operations shall apply only to taxpayers that have entered into a memorandum of understanding with the Virginia Economic Development Partnership Authority on or after July 1, 2015, to make a new capital investment of at least \$150 million in an enterprise data center in the Commonwealth on or after such date. The apportionment formula under this section shall apply to such taxpayers beginning with the taxable year for which the Virginia Economic Development Partnership Authority provides a written certification to the taxpayer that the new capital investment has been completed.

D. The General Assembly of Virginia finds that capital investment in data centers is essential to the continued fiscal health of the Commonwealth. In this modern economy, states often compete for quality data centers. Accordingly, the provisions of subsection C relating to capital investment in enterprise data centers are integral to the purpose of this section. If any provision of this section is for any reason held to be invalid or unconstitutional by the decision of a court of competent jurisdiction, that provision shall not be deemed severable.

306 *E. Any eligible company, as defined in § 58.1-405.1, that apportions its income pursuant to this*
307 *section may subtract the value of its sales in any qualified locality or qualified localities, as defined in*
308 *§ 58.1-405.1, during the taxable year from the numerator of the ratio in subdivision A 2. Such eligible*
309 *company may make such modification for the taxable year in which it first becomes eligible and for the*
310 *four subsequent, consecutive taxable years, except for any year in which the eligible company's (i) total,*
311 *cumulative new capital investment falls below the applicable initial threshold or (ii) number of new jobs*
312 *falls below the applicable initial threshold.*

313 **2. That the Virginia Economic Development Partnership Authority shall promulgate guidelines**
314 **regarding the certification process described in subsection B of § 58.1-405.1 of the Code of**
315 **Virginia, as created by this act, and that the Department of Taxation shall promulgate guidelines**
316 **regarding the modifications to apportionment formulae described in §§ 58.1-405, 58.1-408,**
317 **58.1-417, 58.1-418, 58.1-419, 58.1-420, 58.1-422, 58.1-422.1, and 58.1-422.2 of the Code of Virginia,**
318 **as amended by this act.**