Fifty-fifth
Legislative Assembly
of North Dakota

# SENATE BILL NO. 2331

Introduced by

Senators Nething, Kringstad, Wogsland

Representatives Bernstein, Mahoney, Wardner

A BILL for an Act to create and enact chapter 57-35.3 of the North Dakota Century Code, relating to taxation of financial institutions and allocation of tax revenue; to amend and reenact section 10-30.2-11, subdivision i of subsection 1 of section 57-38-01.2, and subdivision g of subsection 1 of section 57-38-01.3 of the North Dakota Century Code, relating to taxation; to repeal chapters 57-35, 57-35.1, and 57-35.2 of the North Dakota Century Code, relating to the taxation of banks, trust companies and building and loan associations; to provide penalties; to provide continuing appropriations; and to provide an effective date.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Section 10-30.2-11 of the North Dakota Century Code is amended and reenacted as follows:

**10-30.2-11. Tax credits for investment by ~~banks, savings and loan associations, trust companies,~~ <u>financial institutions</u> and insurance companies.** A ~~bank, savings and loan association, trust company,~~ <u>financial institution as defined in section 57-35.3-01</u> or insurance company that invests in stock issued by the corporation, or in a separate legal entity such as a limited partnership or limited liability company created by the corporation as an affiliate for the purpose of obtaining investment capital from the public, or ~~investments~~ <u>invests</u> in either equity or debt instruments or securities offered by a small business investment company created by the corporation and licensed by the small business administration under the Small Business Investment Company Act of 1958 [Pub. L. 85-699; 72 Stat. 689; 15 U.S.C. 661 et seq.], or the Small Business Equity Enhancement Act of 1992 [Pub. L. 102-366; 106 Stat. 1007-1020; 15 U.S.C. 661 et seq.], and any amendments thereto, is entitled, subject to section 10-30.2-13, to a credit in an amount equal to twenty-five percent of the total amount invested against the tax liability imposed against the taxpayer pursuant to ~~sections~~ <u>section</u> 26.1-03-17~~,~~ ~~57-35-02, 57-35.1-02, and 57-35.2-02~~ <u>or sections 57-35.3-01 through 57-35.3-12</u>, if applicable.

The tax credit allowed under this section must be credited against the taxpayer's tax liability for the taxable year in which full consideration for the investment is paid by the taxpayer. The amount by which the credit allowed by this section exceeds the taxpayer's tax liability in that year may be carried forward for seven taxable years. Except in the case of a tax credit that is carried forward from a prior tax year, no tax credit is allowed under this section to a taxpayer who received a tax credit for investment in the corporation and as a result of the dissolution of the corporation agreed to invest in the small business investment company created by the corporation and licensed by the small business administration under the Small Business Investment Company Act of 1958 [Pub. L. 85-699; 72 Stat. 689; 15 U.S.C. 661 et seq.] or the Small Business Equity Enhancement Act of 1992 [Pub. L. 102-366; 106 Stat. 1007-1020; 15 U.S.C. 661 et seq.].

**SECTION 2.** Chapter 57-35.3 of the North Dakota Century Code is created and enacted as follows:

<u>**57-35.3-01. Definitions.**</u> <u>As used in sections 57-35.3-01 through 57-35.3-12, unless the context otherwise requires:</u>

<u>1.</u> <u>"Commissioner" means the state tax commissioner.</u>

<u>2.</u> <u>"Financial institution" means:</u>

<u>a.</u> <u>A corporation or other business entity registered under state law as a bank holding company, registered under the Bank Holding Company Act of 1956, as amended [Pub. L. 84-240; 70 Stat. 133; 12 U.S.C. 1841 et seq.], or registered as a savings and loan holding company under the National Housing Act, as amended [Pub. L. 73-847; 48 Stat. 1246; 12 U.S.C. 1701 et seq.];</u>

<u>b.</u> <u>A national bank organized and existing as a national bank association pursuant to the provisions of the National Bank Act [1864 ch. 106, §5; 13 Stat. 100; 12 U.S.C. 21 et seq.];</u>

<u>c.</u> <u>A savings association or federal savings bank as defined in the Federal Deposit Insurance Act [Pub. L. 81-967; 64 Stat. 873; 12 U.S.C. 1813(b)(1)];</u>

<u>d.</u> <u>A bank or thrift institution incorporated or organized under the laws of any state;</u>

e. A trust company organized under the laws of any state, the United States, a dependency or insular possession of the United States, or a foreign country;

f. A corporation organized under the provisions of Public Law No. 63-6, §25A [38 Stat. 273; 12 U.S.C. 611 to 631];

g. An agency or branch of a foreign depository as defined in Public Law No. 95-369 [92 Stat. 607; 12 U.S.C. 3101];

h. A production credit association organized under the Farm Credit Act of 1933 [Pub. L. 73-98; 48 Stat. 257; 12 U.S.C. 1131 et seq.], all of the stock of which held by the federal production credit corporation has been retired;

i. A corporation the voting stock of which is more than fifty percent owned, directly or indirectly, by any person or business entity described in subdivisions a through h other than an insurance company taxable under section 26.1-03-17 or a corporation taxable under chapter 57-38;

j. A corporation or other business entity that derives more than fifty percent of its total gross income for financial accounting purposes from finance leases. For purposes of this subdivision, a "finance lease" means any lease transaction that is the functional equivalent of an extension of credit and which transfers substantially all of the benefits and risks incident to the ownership of property. The phrase includes any "direct financing lease" or "leverage lease" that meets the criteria of financial accounting standards board statement no. 13, "accounting for leases", or any other lease that is accounted for as a financing by a lessor under generally accepted accounting principles. For the classification under this subdivision to apply:

(1) The average of the gross income in the current tax year and immediately preceding two tax years must satisfy the more than fifty percent requirement; and

(2) Gross income from incidental or occasional transactions must be disregarded; or

k. Any other person or business entity, other than an insurance company taxable under section 26.1-03-17, a real estate broker, a securities dealer, or a person or entity taxable under chapter 57-38, which derives more than fifty percent of its gross income from activities that a person described in subdivisions b through h and j is authorized to transact. For the purpose of this subsection, the computation of gross income does not include income from nonrecurring, extraordinary items.

The commissioner may exclude any person from the application of subdivision k upon that person proving, by clear and convincing evidence, that the income-producing activity of that person is not in substantial competition with those persons described in subdivisions b through h and j.

3. "Internal Revenue Code" means the United States Internal Revenue Code of 1986, as amended.

4. "Taxable income" means federal taxable income, as defined in the Internal Revenue Code, determined on a separate legal entity basis, with the modifications provided in section 57-35.3-02.

5. "Taxpayer" means an entity subject to the tax imposed by sections 57-35.3-01 through 57-35.3-12.

Any term used in sections 57-35.3-01 through 57-35.3-12 has the same meaning as when used in a comparable context in the Internal Revenue Code unless a different meaning is clearly required or intended.

**57-35.3-02. Taxable income.**

1. In determining "taxable income" there must be added to federal taxable income:
   a. The adjustments provided by subdivisions d, e, and i of subsection 1 of section 57-38-01.3;
   b. Interest not subject to federal tax upon obligations of the state of North Dakota and its political subdivisions;
   c. The amount of any charitable contribution deduction taken for federal income tax purposes under section 170 of the Internal Revenue Code;
   d. The amount of any bad debt reserve deduction taken for federal income tax purposes under section 585 or 593 of the Internal Revenue Code; and
   e. Dividends paid by a federal reserve bank to the extent not subject to federal tax.

2. In determining "taxable income" there must be subtracted from federal taxable income:

a. The adjustments provided by subdivisions b, c, and h of subsection 1 of section 57-38-01.3;

b. In the case of a financial institution described in subdivision a of subsection 2 of section 57-35.3-01, the adjustment provided by subdivision g of subsection 1 of section 57-38-01.3;

c. If the bad debt reserve method has been used pursuant to section 585 or 593 of the Internal Revenue Code to account for bad debts for federal income tax purposes, an amount equal to the deduction for bad debts that would have been allowed under section 166(a) of the Internal Revenue Code if a deduction had not been claimed under section 585 or 593;

d. The amount of any interest and expenses relating to income not taxable for federal income tax purposes if the income is taxable under sections 57-35.3-01 through 57-35.3-12 and the interest and expenses were disallowed as deductions under section 171(a)(2), 265, or 291 of the Internal Revenue Code in computing federal taxable income;

e. The amount of any wage and salary expenses disallowed as deductions under section 280C(a) of the Internal Revenue Code in computing federal taxable income;

f. An amount equal to the deduction for charitable contributions that would be allowed for federal income tax purposes under section 170 of the Internal Revenue Code if the percentage limitation of section 170(b)(2) of the Internal Revenue Code was applied in all relevant taxable periods to taxable income, rather than federal taxable income, but computed without regard to this subdivision and that portion of subdivision a that refers to subdivision g of subsection 1 of section 57-38-01.3. However, no deduction is allowable for a contribution if and to the extent that a credit is allowed for the contribution under section 57-35.3-05; and

g. The amount of net income not allocated and apportioned to this state under sections 57-35.3-13 through 57-35.3-17, but only to the extent that the amount of net income not allocated and apportioned to this state under those sections is not included in any adjustment made pursuant to the preceding subdivisions.

3. A net operating loss for any prior taxable period beginning on or after January 1, 1991, attributable to North Dakota sources, must be allowed as a deduction from the sum otherwise calculated under this section to the extent that it exceeds the taxable income for each of the prior taxable years to which the loss may be carried under sections 57-35.3-01 through 57-35.3-12 or of prior law governing the taxation of financial institutions. Net operating losses may be carried forward for the same time period as federal net operating losses may be carried forward. If a financial institution uses an apportionment formula in the loss year to determine the amount of income or loss that is attributable to North Dakota sources, the amount of the North Dakota loss so determined is the net operating loss attributable to North Dakota sources for purposes of this subsection. No deduction may be taken for a carryforward when determining the amount of net operating loss that is attributable to North Dakota sources. No net operating loss carryback deduction is allowed.

4. The commissioner may adopt rules to prevent requiring income that had been previously taxed under sections 57-35.3-01 through 57-35.3-12, or prior law governing the taxation of financial institutions, from being taxed again because of the provisions of sections 57-35.3-01 through 57-35.3-12 and to adopt rules to prevent any income from becoming exempt from taxation because of sections 57-35.3-01 through 57-35.3-12 if it would otherwise have been subject to taxation under sections 57-35.3-01 through 57-35.3-12.

5. If it appears to the commissioner that the segregation of assets shown by any return made under sections 57-35.3-01 through 57-35.3-12 does not properly reflect the taxpayer's activity or business done, or the income earned from the taxpayer's activity or from business done in this state, because of the character of the taxpayer's business and the character and location of its assets, the commissioner may equitably adjust the tax.

**57-35.3-03. Imposition and basis of tax.** An annual tax is imposed upon each financial institution for the grant to it of the privilege of transacting, or for the actual transacting by it, of business within this state during any part of each tax year. The tax is based upon and measured by the taxable income of the financial institution for the calendar year. The rate of tax is seven percent of taxable income, but the amount of tax may not be less than fifty dollars.

**57-35.3-04. Lieu tax.** The tax imposed by sections 57-35.3-01 through 57-35.3-12 is in lieu of all other state, county, or local taxes or impositions, except motor vehicle fuel and special fuel taxes, sales and use taxes, motor vehicle excise taxes, and real property taxes.

**57-35.3-05. Credits.**

1. a. There is allowed a credit against the tax imposed by sections 57-35.3-01 through 57-35.3-12 in an amount equal to fifty percent of the aggregate amount of charitable contributions made by the taxpayer during the taxable year to nonprofit private institutions of higher education located within the state or to the North Dakota independent college fund. The amount allowable as a credit under this subdivision for any taxable year may not exceed five and seven-tenths percent of the tax before credits allowed under this section, or two thousand five hundred dollars, whichever is less.

   b. There is allowed a credit against the tax imposed by sections 57-35.3-01 through 57-35.3-12 in an amount equal to fifty percent of the aggregate amount of charitable contributions made by the taxpayer during the taxable year to nonprofit private institutions of secondary education located within the state. The amount allowable as a credit under this subdivision for any taxable year may not exceed five and seven-tenths percent of the tax before credits allowed under this section, or two thousand five hundred dollars, whichever is less.

   c. For the purpose of this subsection, the term "nonprofit private institution of higher education" means only a nonprofit private educational institution located in North Dakota which normally maintains a regular faculty and curriculum and which normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, and which regularly offers education at a level above the twelfth grade. The term "nonprofit private institution of secondary education" means only a nonprofit private educational institution located in North Dakota which normally maintains a regular faculty and curriculum approved by the department of public instruction and which normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, and which regularly offers education to students in the ninth through twelfth grades.

d. For the purposes of this subsection, a taxpayer may elect to treat a contribution as made in the preceding taxable year if the contribution and election are made not later than the time prescribed for filing the return for the taxable year.

2. a. There is allowed a credit against the tax imposed by sections 57-35.3-01 through 57-35.3-12 in an amount equal to any overpayment of tax paid pursuant to chapter 57-35 or 57-35.1, for a taxable year beginning before January 1, 1997, to the extent that the overpayment would have been an allowable deduction from tax payable for the current taxable year, under section 57-35-12 or 57-35.1-07, if chapters 57-35 and 57-35.1 applied to the current taxable year. The amount allowable as a credit under this subsection for any taxable year may not exceed five-sevenths of the tax before credits allowed under this section.

b. For purposes of determining distributions to and from the counties under section 57-38.3-09:

(1) The balance in the financial institution tax distribution fund and the amount of the payment received by each county from the state shall be determined as if any credit allowed under subdivision a had not been claimed and the full amount of the tax otherwise due had been timely paid;

(2) The credited amount must be deducted from the distributions that would otherwise be made to and from the county that received the tax overpayment until the sum of the deductions equals the credit; and

(3) The deductions from distributions made by a county to each distributee must be proportionate to the overpayment of tax received by each distributee.

**57-35.3-06. Tax return.** On or before April fifteenth of each year, the taxpayer shall file with the commissioner, on forms or in a manner prescribed by the commissioner, a report in writing under oath showing the amount of taxable income of the financial institution for the preceding calendar year. If required by the commissioner, the return must be accompanied by a true copy of the federal income tax return of the taxpayer or by equivalent information in the form and manner prescribed by the commissioner. A true copy of the federal income tax return must be furnished to the commissioner by the taxpayer at any time after the taxpayer has filed the return required by this section if required by the commissioner before the expiration of the applicable period for assessment of additional tax liability under section 57-38-38. The commissioner may prescribe alternative methods for signing, subscribing, or verifying a return filed by electronic means, including telecommunications, that has the same validity and consequence as the actual signature and written declaration for a paper return. The commissioner may grant a reasonable extension of time for filing a return under the standards and terms applicable to other corporations under section 57-38-34.

**57-35.3-07. Payment of tax.** Two-sevenths of the tax before credits allowed under section 57-35.3-05, less the credit allowed under subsection 1 of section 57-35.3-05, must be paid to the commissioner on or before April fifteenth of the year in which the return is due, regardless of any extension of the time for filing the return granted under section 57-35.3-06. Five-sevenths of the tax before credits allowed under section 57-35.3-05, less the credit allowed under subsection 2 of section 57-35.3-05, must be paid to the commissioner on or before January fifteenth of the year after the return is due. Payment must be made by check, draft, or money order, payable to the commissioner, or as prescribed by the commissioner under subsection 15 of section 57-01-02.

**57-35.3-08. Disposition of tax.** The commissioner shall deposit the portion of the tax payable in the year the return is due in the general fund of the state treasury, and shall deposit the portion of the tax payable in the year after the return is due in the financial institution tax distribution fund of the state treasury, which is hereby created. Interest, penalty, and late tax payments attributable to each portion of the tax must be deposited in the appropriate fund.

**<u>57-35.3-09. Financial institution tax distribution fund - Continuing appropriation.</u>** <u>The balance in the financial institution tax distribution fund on February first of 1999 and each subsequent year must be distributed in the following manner:</u>

<u>1.</u> <u>On or before February 1, 1999, the commissioner shall determine and certify to all county auditors:</u>

<u>a.</u> <u>The total amount of tax certified to each county under chapters 57-35 and 57-35.1 in the years 1993 through 1997; and</u>

<u>b.</u> <u>The amount determined under subdivision a for each county as a percentage of the amount determined under subdivision a for all counties.</u>

<u>2.</u> <u>On or before February fifteenth of 1999 and each subsequent year, the commissioner shall determine and certify to the state treasurer an amount for payment by the state treasurer to each county treasurer equal to:</u>

<u>a.</u> <u>The percentage for that county determined under subdivision b of subsection 1; multiplied by</u>

<u>b.</u> <u>The balance in the financial institution tax distribution fund on February first of that year.</u>

<u>3.</u> <u>On or before March first of 1999 and each subsequent year, the state treasurer shall pay to the treasurer of each county the amount determined for that county under subsection 2. The amounts necessary to make these payments are appropriated to the state treasurer as a standing and continuing appropriation for distribution under this subdivision.</u>

<u>4.</u> <u>On or before February 1, 1999, the treasurer of each county shall determine and certify to the state treasurer and to all affected political subdivisions of the county:</u>

<u>a.</u> <u>The total amount of tax apportioned and distributed to the state, the county, and each political subdivision of the county under sections 57-35-13 and 57-35.1-06 in the years 1994 through 1998; and</u>

<u>b.</u> <u>The amount determined under subdivision a for each distributee as a percentage of the amount determined under subdivision a for all distributees.</u>

<u>5.</u> <u>On or before the tenth working day of March in 1999 and each subsequent year, the treasurer of each county shall determine and distribute to each distributee described in subsection 4 an amount equal to:</u>

a. The percentage for that distributee determined under subdivision b of subsection 4; multiplied by

b. The amount of the payment by the state to the county in that year under subsection 3.

**57-35.3-10. Certification of estimated tax.** On or before November fifteenth of 1998 and each subsequent year, the commissioner shall determine the estimated amount of the distribution to be made to each county in the following year under section 57-35.3-09 and shall certify that amount to the county auditor.

**57-35.3-11. Refunds.** Refunds of the tax imposed by sections 57-35.3-01 through 57-35.3-12, including related interest, must be paid from the state general fund. An amount equal to the portion of any such refund attributable to tax collections deposited in the financial institution tax distribution fund must be reimbursed to the state general fund from the first available assets of the financial institution tax distribution fund, with interest thereon at the rate prescribed by section 57-38-35.2 from the date of payment of the refund from the state general fund. The amounts necessary to pay these refunds are hereby appropriated to the state treasurer as a standing and continuing appropriation for payment under this section.

**57-35.3-12. Applicable provisions of chapter 57-38 relating to administration, interest, and penalties.** The provisions of section 57-38-33, subsection 1 of section 57-38-34, sections 57-38-34.4, 57-38-35.1, 57-38-35.2, 57-38-37, 57-38-38, 57-38-39, 57-38-40, 57-38-44, 57-38-45, 57-38-46, 57-38-47, 57-38-48, 57-38-49, 57-38-50, 57-38-51, 57-38-53, 57-38-54, 57-38-56, and 57-38-57, insofar as consistent therewith, govern the administration of sections 57-35.3-01 through 57-35.3-12. For this purpose, the term "corporation", as used in the sections listed in this section, includes a financial institution.

**57-35.3-13. Apportionment and allocation - General.**

1. Except as otherwise specifically provided, a financial institution whose business activity is taxable both within and without this state shall allocate and apportion its net income as provided in sections 57-35.3-13 through 57-35.3-17. All items of nonbusiness income, meaning income that is not includable in the apportionable income tax base, must be allocated under chapter 57-38.1. A financial institution organized under the laws of a foreign country, the Commonwealth of Puerto Rico, or a territory or possession of the United States the effectively connected income of

which, as defined under the Internal Revenue Code, is taxable both within this state and within another state, other than the state in which it is organized, shall allocate and apportion its net income as provided in sections 57-35.3-13 through 57-35.3-17.

2. All business income, meaning income that is includable in the apportionable income tax base, must be apportioned to this state by multiplying such income by the apportionment percentage. The apportionment percentage is determined by adding the taxpayer's receipts factor under section 57-35.3-15, property factor under section 57-35.3-16, and payroll factor under section 57-35.3-17 together and dividing the sum by three. If one of the factors is missing, the two remaining factors must be added and the sum divided by two. If two of the factors are missing, the remaining factor is the apportionment percentage. A factor is missing if both its numerator and denominator are zero, but it is not missing merely because its numerator is zero.

3. Each factor must be computed according to the method of accounting, cash or accrual basis, used by the taxpayer for the taxable year.

4. If the allocation and apportionment provisions of sections 57-35.3-13 through 57-35.3-17 do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the commissioner may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

   a. Separate accounting;

   b. The exclusion of any one or more of the factors;

   c. The inclusion of one or more additional factors that will fairly represent the taxpayer's business activity in this state; or

   d. The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

**57-35.3-14. Apportionment and allocation - Definitions.** As used in sections 57-35.3-13 through 57-35.3-17, unless the context otherwise requires:

1. "Billing address" means the location indicated in the books and records of the taxpayer on the first day of the taxable year, or on such later date in the taxable

year when the customer relationship began, as the address where any notice, statement, or bill relating to a customer's account is mailed.

2. "Borrower or credit card holder located in this state" means:

   a. A borrower, other than a credit card holder, who is engaged in a trade or business that maintains its commercial domicile in this state; or

   b. A borrower who is not engaged in a trade or business or a credit card holder whose billing address is in this state.

3. "Commercial domicile" means:

   a. The headquarters of the trade or business, meaning the place from which the trade or business is principally managed and directed; or

   b. If a taxpayer is organized under the laws of a foreign country, or of the Commonwealth of Puerto Rico, or any territory or possession of the United States, such taxpayer's commercial domicile must be deemed for the purposes of sections 57-35.3-13 through 57-35.3-17 to be the state of the United States or the District of Columbia from which such taxpayer's trade or business in the United States is principally managed and directed. It is presumed, subject to rebuttal, that the location from which the taxpayer's trade or business is principally managed and directed is the state of the United States or the District of Columbia to which the greatest number of employees are regularly connected or out of which they are working, irrespective of where the services of such employees are performed, as of the last day of the taxable year.

4. "Commissioner" means the state tax commissioner.

5. "Compensation" means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services that are included in such employee's gross income under the Internal Revenue Code. In the case of employees not subject to the Internal Revenue Code, such as those employed in foreign countries, the determination of whether such payments would constitute gross income to such employees under the Internal Revenue Code must be made as though those employees were subject to the Internal Revenue Code.

6. "Credit card" means a credit, travel, or entertainment card.

7. "Credit card issuer's reimbursement fee" means the fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit card has charged merchandise or services to the credit card.

8. "Employee" means, with respect to a particular taxpayer, any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee of that taxpayer.

9. "Financial institution" has the meaning given in section 57-35.3-01.

10. "Gross rents" means the actual sum of money or other consideration payable for the use or possession of property.

    a. "Gross rents" includes:

        (1) Any amount payable for the use or possession of real property or tangible property whether designated as a fixed sum of money or as a percentage of receipts, profits, or otherwise;

        (2) Any amount payable as additional rent or in lieu of rent, such as interest, taxes, insurance, repairs, or any other amount required to be paid by the terms of a lease or other arrangement; and

        (3) A proportionate part of the cost of any improvement to real property made by or on behalf of the taxpayer which reverts to the owner or lessor upon termination of a lease or other arrangement. The amount to be included in gross rents is the amount of amortization or depreciation allowed in computing the taxable income base for the taxable year. However, if a building is erected on leased land by or on behalf of the taxpayer, the value of the land is determined by multiplying the gross rent by eight and the value of the building is determined in the same manner as if owned by the taxpayer.

    b. "Gross rents" does not include:

        (1) Reasonable amounts payable as separate charges for water and electric service furnished by the lessor;

        (2) Reasonable amounts payable as service charges for janitorial services furnished by the lessor;

(3) Reasonable amounts payable for storage, provided such amounts are payable for space not designated and not under the control of the taxpayer; and

(4) That portion of any rental payment which is applicable to the space subleased from the taxpayer and not used by it.

11. "Internal Revenue Code" means the United States Internal Revenue Code of 1986, as amended.

12. "Loan" means any extension of credit resulting from direct negotiations between the taxpayer and its customer, or the purchase, in whole or in part, of such extension of credit from another. Loans include participation, syndications, and leases treated as loans for federal income tax purposes. "Loan" does not include properties treated as loans under section 595 of the Internal Revenue Code; futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; non-interest bearing balances due from depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in an REMIC, or other mortgage-backed or asset-backed security; and other similar items.

13. "Loan secured by real property" means that fifty percent or more of the aggregate value of the collateral used to secure a loan or other obligation, when valued at fair market value as of the time the original loan or obligation was incurred, was real property.

14. "Merchant discount" means the fee or negotiated discount charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit card is accepted in payment for merchandise or services sold to the credit card holder.

15. "Participation" means an extension of credit in which an undivided ownership interest is held on a pro rata basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.

16. "Person" means an individual, estate, trust, partnership, corporation, and any other business entity.

17. "Principal base of operations" with respect to transportation property means the place of more or less permanent nature from which said property is regularly directed or controlled. With respect to an employee, the "principal base of operations" means the place of more or less permanent nature from which the employee regularly starts the employee's work and to which the employee customarily returns in order to receive instructions from the employee's employer, communicates with the employee's customers or other persons, or performs any other functions necessary to the exercise of the employee's trade or profession at some other point or points.

18. "Real property owned" and "tangible personal property owned" mean real and tangible personal property, respectively, on which the taxpayer may claim depreciation for federal income tax purposes, or to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes, or could claim depreciation if subject to federal income tax. Real and tangible personal property do not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure.

19. "Regular place of business" means an office at which the taxpayer carries on its business in a regular and systematic manner and which is continuously maintained, occupied, and used by employees of the taxpayer.

20. "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States or any foreign country.

21. "Syndication" means an extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.

22. "Taxable" means either:

a. That a taxpayer is subject in another state to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, a corporate stock tax including a bank shares tax, a single business tax, or an earned surplus tax, or any tax that is imposed upon or measured by net income; or

b. That another state has jurisdiction to subject the taxpayer to any of those taxes regardless of whether or not the state subjects the taxpayer to those taxes.

23. "Transportation property" means vehicles and vessels capable of moving under their own power, such as aircraft, trains, water vessels, and motor vehicles, as well as any equipment or containers attached to such property, such as rolling stock, barges, trailers, or the like.

**57-35.3-15. Apportionment and allocation - Receipts factor.**

1. General. The receipts factor is a fraction, the numerator of which is the receipts of the taxpayer in this state during the taxable year and the denominator of which is the receipts of the taxpayer within and without this state during the taxable year. The method of calculating receipts for purposes of the denominator is the same as the method used in determining receipts for purposes of the numerator. The receipts factor includes only those receipts described in this section which constitute business income and are included in the computation of the apportionable income base for the taxable year.

2. Receipts from the lease of real property. The numerator of the receipts factor includes receipts from the lease or rental of real property owned by the taxpayer if the property is located within this state or receipts from the sublease of real property if the property is located within this state.

3. Receipts from the lease of tangible personal property.

   a. Except as described in subdivision b, the numerator of the receipts factor includes receipts from the lease or rental of tangible personal property owned by the taxpayer if the property is located within this state when it is first placed in service by the lessee.

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

4. Interest from loans secured by real property.

a. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans secured by real property if the property is located within this state. If the property is located both within this state and one or more other states, the receipts described in this subsection are included in the numerator of the receipts factor if more than fifty percent of the fair market value of the real property is located within this state. If more than fifty percent of the fair market value of the real property is not located within any one state, then the receipts described in this subsection must be included in the numerator of the receipts factor if the borrower is located in this state.

b. The determination of whether the real property securing a loan is located within this state must be made as of the time the original agreement was made and any and all subsequent substitutions of collateral must be disregarded.

5. Interest from loans not secured by real property. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans not secured by real property if the borrower is located in this state.

6. Net gains from the sale of loans. The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans include income recorded under the coupon stripping rules of section 1286 of the Internal Revenue Code.

a. The amount of net gains, but not less than zero, from the sale of loans secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor under subsection 4 and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

b. The amount of net gains, but not less than zero, from the sale of loans not secured by real property included in the numerator is determined by multiplying such net gains by a fraction the numerator of which is the amount included in the numerator of the receipts factor under subsection 5 and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

7. Receipts from credit card receivables. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from credit card receivables and receipts from fees charged to cardholders, such as annual fees, if the billing address of the cardholder is in this state.

8. Net gains from the sale of credit card receivables. The numerator of the receipts factor includes net gains, but not less than zero, from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor under subsection 7 and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.

9. Credit card issuer's reimbursement fees. The numerator of the receipts factor includes all credit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor under subsection 7 and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to cardholders.

10. Receipts from merchant discount. The numerator of the receipts factor includes receipts from merchant discount if the commercial domicile of the merchant is in this state. Such receipts must be computed net of any cardholder chargebacks, but may not be reduced by any interchange transaction fees or by any issuer's reimbursement fees paid to another for charges made by its cardholders.

11. Loan servicing fees.

a. (1) The numerator of the receipts factor includes loan servicing fees derived from loans secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor under subsection 4 and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.

(2) The numerator of the receipts factor includes loan servicing fees derived from loans not secured by real property multiplied by a fraction the numerator of which is the amount included in the numerator of the receipts factor under subsection 5 and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

b. In circumstances in which the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, the numerator of the receipts factor must include such fees if the borrower is located in this state.

12. Receipts from services. The numerator of the receipts factor includes receipts from services not otherwise apportioned under this section if the service is performed in this state. If the service is performed both within and without this state, the numerator of the receipts factor includes receipts from services not otherwise apportioned under this section, if a greater proportion of the income-producing activity is performed in this state based on cost of performance.

13. Receipts from investment assets and activities and trading assets and activities.

a. Interest; dividends; net gains, but not less than zero; and other income from investment assets and activities and from trading assets and activities must be included in the receipts factor. Investment assets and activities and trading assets and activities include investment securities, trading account assets, federal funds, securities purchased and sold under agreements to resell or repurchase, options, futures contracts, forward contracts, notional principal contracts such as swaps, equities, and foreign currency transactions.

With respect to the investment and trading assets and activities described in paragraphs 1 and 2, the receipts factor must include the amounts described in those paragraphs.

(1) The receipts factor must include the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under repurchase agreements.

(2) The receipts factor must include the amount by which interest, dividends, gains and other income from trading assets and activities, including assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, exceed amounts paid in lieu of interest, amounts paid in lieu of dividends, and losses from such assets and activities.

b. The numerator of the receipts factor includes interest; dividends; net gains, but not less than zero; and other income from investment assets and activities and from trading assets and activities described in subdivision a which are attributable to this state.

(1) The amount of interest; dividends; net gains, but not less than zero; and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the average value of such assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.

(2) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in paragraph 1 of subdivision a from such funds and such securities by a fraction, the numerator of which is the average value of federal funds

<u>sold and securities purchased under agreements to resell which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such funds and such securities.</u>

<u>(3)</u> <u>The amount of interest, dividends, gains and other income from trading assets and activities, including assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, but excluding amounts described in paragraph 1 or 2, attributable to this state and included in the numerator is determined by multiplying the amount described in paragraph 2 of subdivision a by a fraction, the numerator of which is the average value of such trading assets which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.</u>

<u>(4)</u> <u>For purposes of this subdivision, average value must be determined using the rules for determining the average value of tangible personal property set forth in subsections 3 and 4 of section 57-35.3-16.</u>

<u>c.</u> <u>In lieu of using the method set forth in subdivision b, the taxpayer may elect, or the commissioner may require in order to fairly represent the business activity of the taxpayer in this state, the use of the method set forth in this subdivision.</u>

<u>(1)</u> <u>The amount of interest; dividends; net gains, but not less than zero; and other income from investment assets and activities in the investment account to be attributed to this state and included in the numerator is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the gross income from such assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.</u>

<u>(2)</u> <u>The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold</u>

under repurchase agreements attributable to this state and included in the numerator is determined by multiplying the amount described in paragraph 1 of subdivision a from such funds and such securities by a fraction, the numerator of which is the gross income from such funds and such securities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such funds and such securities.

(3) The amount of interest, dividends, gains and other income from trading assets and activities, including assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, but excluding amounts described in paragraphs 1 and 2, attributable to this state and included in the numerator is determined by multiplying the amount described in paragraph 2 of subdivision a by a fraction, the numerator of which is the gross income from such trading assets and activities which are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.

d. If the taxpayer elects or is required by the commissioner to use the method set forth in subdivision c, the taxpayer shall use this method on all subsequent returns unless the taxpayer receives prior permission from the commissioner to use, or the commissioner requires, a different method.

e. The taxpayer has the burden of proving that an investment asset or activity or trading asset or activity was properly assigned to a regular place of business outside this state by demonstrating that the day-to-day decisions regarding the asset or activity occurred at a regular place of business outside this state. If the day-to-day decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business and one such regular place of business is in this state and one such regular place of business is outside this state, such asset or activity must be considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Unless the taxpayer demonstrates to the contrary, such policies and guidelines must be presumed to be established at the commercial domicile of the taxpayer.

14. All other receipts. The numerator of the receipts factor includes all other receipts under the rules set forth in chapter 57-38.1, to the extent not inconsistent with this section.

15. Attribution of certain receipts to commercial domicile. All receipts that would be assigned under this section to a state in which the taxpayer is not taxable must be included in the numerator of the receipts factor if the taxpayer's commercial domicile is in this state.

**57-35.3-16. Apportionment and allocation - Property factor.**

1. General. The property factor is a fraction, the numerator of which is the average value of real property and tangible personal property rented to the taxpayer that is located or used within this state during the taxable year, the average value of the taxpayer's real and tangible personal property owned that is located or used within this state during the taxable year, and the average value of the taxpayer's loans and credit card receivables that are located within this state during the taxable year, and the denominator of which is the average value of all such property located or used within and without this state during the taxable year.

2. Property included. The property factor includes only property the income or expenses of which are included, or would have been included if not fully depreciated or expensed or depreciated or expensed to a nominal amount, in the computation of the apportionable income base for the taxable year.

3. Value of property owned by the taxpayer.

   a. The value of real property and tangible personal property owned by the taxpayer is the original cost or other basis of such property for federal income tax purposes without regard to depletion, depreciation, or amortization.

   b. Loans are valued at their outstanding principal balance, without regard to any reserve for bad debts. If a loan is charged off in whole or in part for federal income tax purposes, the portion of the loan charged off is not outstanding. A specifically allocated reserve established pursuant to regulatory or financial accounting guidelines which is treated as charged off for federal income tax purposes must be treated as charged off for purposes of this section.

c. Credit card receivables are valued at their outstanding principal balance, without regard to any reserve for bad debts. If a credit card receivable is charged off in whole or in part for federal income tax purposes, the portion of the receivable charged off is not outstanding.

4. Average value of property owned by the taxpayer. The average value of property owned by the taxpayer is computed on an annual basis by adding the value of the property on the first day of the taxable year and the value on the last day of the taxable year and dividing the sum by two. If averaging on this basis does not properly reflect average value, the commissioner may require averaging on a more frequent basis. The taxpayer may elect to average on a more frequent basis. When averaging on a more frequent basis is required by the commissioner or is elected by the taxpayer, the same method of valuation must be used consistently by the taxpayer with respect to property within and without this state and on all subsequent returns unless the taxpayer receives prior permission from the commissioner or the commissioner requires a different method of determining average value.

5. Average value of real property and tangible personal property rented to the taxpayer.

a. The average value of real property and tangible personal property that the taxpayer has rented from another, and which is not treated as property owned by the taxpayer for federal income tax purposes, must be determined annually by multiplying the gross rents payable during the taxable year by eight.

b. If the use of the general method described in this subsection results in inaccurate valuations of rented property, any other method that properly reflects the value may be adopted by the commissioner or by the taxpayer when approved in writing by the commissioner. Once approved, such other method of valuation must be used on all subsequent returns unless the taxpayer receives prior approval from the commissioner or the commissioner requires a different method of valuation.

6. Location of real property and tangible personal property owned by or rented to the taxpayer.

a. Except as described in subdivision b, real property and tangible personal property owned by or rented to the taxpayer is considered to be located within this state if it is physically located, situated, or used within this state.

b. Transportation property is included in the numerator of the property factor to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state and the amount of value that is to be included in the numerator of this state's property factor is determined by multiplying the average value of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft everywhere. If the extent of the use of any transportation property within this state cannot be determined, then the property will be deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle will be deemed to be used wholly in the state in which it is registered.

7. Location of loans.

a. (1) A loan is considered to be located within this state if it is properly assigned to a regular place of business of the taxpayer within this state.

(2) A loan is properly assigned to the regular place of business with which it has a preponderance of substantive contacts. A loan assigned by the taxpayer to a regular place of business without the state must be presumed to have been properly assigned if:

(a) The taxpayer has assigned, in the regular course of the taxpayer's business, such loan on its records to a regular place of business consistent with federal or state regulatory requirements;

(b) Such assignment on the taxpayer's records is based upon substantive contacts of the loan to that regular place of business; and

(c) The taxpayer uses those records reflecting assignment of loans for the filing of all state and local tax returns for which an assignment of loans to a regular place of business is required.

(3) The presumption of proper assignment of a loan provided in paragraph 2 may be rebutted upon a showing by the commissioner, supported by a preponderance of the evidence, that the preponderance of substantive contacts regarding the loan did not occur at the regular place of business to which it was assigned on the taxpayer's records. When such presumption has been rebutted, the loan must then be located within this state if the taxpayer had a regular place of business within this state at the time the loan was made and the taxpayer fails to show, by a preponderance of the evidence, that the preponderance of substantive contacts regarding such loan did not occur within this state.

b. In the case of a loan that is assigned by the taxpayer to a place without this state which is not a regular place of business, it must be presumed, subject to rebuttal by the taxpayer on a showing supported by the preponderance of evidence, that the preponderance of substantive contacts regarding the loan occurred within this state if, at the time the loan was made, the taxpayer's commercial domicile, as defined in subsection 3 of section 57-35.3-14, was within this state.

c. To determine the state in which the preponderance of substantive contacts relating to a loan have occurred, the facts and circumstances regarding the loan at issue must be reviewed on a case-by-case basis and consideration must be given to such activities as the solicitation, investigation, negotiation, approval, and administration of the loan. For purposes of this subdivision:

(1) "Administration" means the process of managing the account. This process includes bookkeeping, collecting the payments, corresponding with the customer, reporting to management regarding the status of the agreement, and proceeding against the borrower or the security interest if the borrower is in default. Such activity is located at the regular place of business which oversees this activity.

(2) "Approval" means the procedure by which employees or the board of directors of the taxpayer make the final determination whether to enter into the agreement. Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed. If the board of directors makes the final determination, such activity is located at the commercial domicile of the taxpayer.

(3) "Investigation" means the procedure by which employees of the taxpayer determine the credit-worthiness of the customer as well as the degree of risk involved in making a particular agreement. Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed.

(4) "Negotiation" means the procedure by which employees of the taxpayer and the taxpayer's customer determine the terms of the agreement such as the amount, duration, interest rate, frequency of repayment, currency denomination, and security required. Such activity is located at the regular place of business which the taxpayer's employees are regularly connected with or working out of, regardless of where the services of such employees were actually performed.

(5) "Solicitation" means either active or passive solicitation. Active solicitation occurs when an employee of the taxpayer initiates the contact with the customer. Such activity is located at the regular place of business which the taxpayer's employee is regularly connected with or working out of, regardless of where the services of such employee were actually performed. Passive solicitation occurs when the customer initiates the contact with the taxpayer. If the customer's initial contact was not at a regular place of business of the taxpayer, the regular place of business, if any, where the passive solicitation occurred is determined by the facts in each case.

8. Location of credit card receivables. For purposes of determining the location of credit card receivables, credit card receivables must be treated as loans and are subject to the provisions of subsection 7.

9. Period for which properly assigned loan remains assigned. A loan that has been properly assigned to a state, absent any change of material fact, must remain assigned to that state for the length of the original term of the loan. Thereafter, that loan may be properly assigned to another state if that loan has a preponderance of substantive contact to a regular place of business there.

**57-35.3-17. Apportionment and allocation - Payroll factor.**

1. General. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the taxable year by the taxpayer for compensation and the denominator of which is the total compensation paid both within and without this state during the taxable year. The payroll factor must include only that compensation that is included in the computation of the apportionable income tax base for the taxable year.

2. Compensation relating to nonbusiness income. The compensation of any employee for services or activities that are connected with the production of nonbusiness income, meaning income which is not includable in the apportionable income base, and payments made to any independent contractor or any other person not properly classifiable as an employee must be excluded from both the numerator and denominator of the factor.

3. When compensation paid in this state. Compensation is paid in this state if any one of the following tests, applied consecutively, is met:

   a. The employee's services are performed entirely within this state.

   b. The employee's services are performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state. The term "incidental" means any service that is temporary or transitory in nature or which is rendered in connection with an isolated transaction.

   c. If the employee's services are performed both within and without this state, the employee's compensation must be attributed to this state:

(1) If the employee's principal base of operations is within this state;

(2) If there is no principal base of operations in any state in which some part of the services are performed, but the place from which the services are directed or controlled is in this state; or

(3) If the principal base of operations and the place from which the services are directed or controlled are not in any state in which some part of the service is performed but the employee's residence is in this state.

**SECTION 3. AMENDMENT.** Subdivision i of subsection 1 of section 57-38-01.2 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

i. Reduced by any dividends or income, up to a maximum of fifteen thousand dollars, received from stock or interest in any corporation and included in the adjusted gross income as computed for federal income tax purposes where the income of such corporation has been assessed and tax paid by the corporation under this chapter or ~~chapter 57-35, 57-35.1, or 57-35.2~~ sections 57-35.3-01 through 57-35.3-12 and such dividends or income was received by the taxpayer as income during the income year if such corporation has reported the name and address of each North Dakota resident owning stock and the amount of dividends or income paid each such person during the year; provided, that when only part of the income of any corporation shall have been assessed and corporation income tax paid thereon under this chapter or ~~chapter 57-35, 57-35.1, or 57-35.2~~ sections 57-35.3-01 through 57-35.3-12, only a corresponding part of the dividends or income received therefrom and included in federal adjusted gross income shall be subtracted. The commissioner is hereby authorized to prescribe rules and regulations to implement this subdivision to avoid injustice to taxpayers, to prevent duplication of deductions, and to eliminate taxation of income not fairly and properly taxable under this chapter.

**SECTION 4. AMENDMENT.** Subdivision g of subsection 1 of section 57-38-01.3 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

g. Reduced by dividends or income received by any person from stock or interest in any corporation, the income of which has been assessed and paid by a corporation under this chapter or ~~chapter 57-35, 57-35.1, or 57-35.2~~ sections 57-35.3-01 through 57-35.3-12, received by the taxpayer and included in the gross income within the income year if such corporation has reported the name and address of each person owning stock and the amount of dividends or income paid each such person during the year, but when only part of the income of any corporation has been assessed and income tax paid under this chapter or ~~chapter 57-35, 57-35.1, or 57-35.2~~ sections 57-35.3-01 through 57-35.3-12, only a corresponding part of the dividends or income received therefrom may be deducted.

**SECTION 5. REPEAL.** Chapters 57-35, 57-35.1, and 57-35.2 of the North Dakota Century Code are repealed.

**SECTION 6. EFFECTIVE DATE.** This Act is effective for taxable years beginning after December 31, 1996.