ACT# 2009-144

HB69

107049-3

By Representatives Lindsey, Irons, Hilliard, Black, Newton (D), Warren, Coleman, Dukes, Ward, Morrow, Gipson, Davis, McMillan, Ford, Galliher, Baker (A), Collier, Ison, Bridges, Sanderford, Todd, Hammon, McClurkin, McCampbell, Fincher, Hill, Mask, Grimes, Wood, Ball, Laird, Spicer, Faust, Martin, Drake, Robinson (J), Curtis, McLaughlin, Shiver, Keahey, Hall, Clouse, Millican, Bentley, Gaston, Barton, Scott, Thigpen, Vance, McCutcheon and Boyd

RFD: Education Appropriations

First Read: 03-FEB-09

PFD: 01/05/2009

ENROLLED, An Act,

Relating to the development in Alabama of the entertainment industry; to attract investment for qualified productions and qualified production companies; to help encourage increased employment opportunities within the state for the entertainment industry and increased global competition with other states in fully developing economic development options in Alabama within the industry; to provide rebates for qualified production projects; to provide exemptions from certain sales, use, and lodging taxes for production companies working in Alabama; to add new provisions to the Code of Alabama 1975, relating to income taxes and investment partnerships and limited liability companies; to require filing composite returns and remittance of taxes on certain nonresident partners or members; to provide for exemptions; to provide an offset for lost revenues resulting from the incentives offered; to specifically repeal inactive statutes providing exemptions which have expired by repealing Act 2001-975, 2001 Regular Session, as amended by Act 2005-305, 2005 Special Session, and to specifically repeal Section 40-18-24.1, Code of Alabama 1975; and to amend Section 40-2A-11, Code of Alabama 1975, to provide further for penalties for failure to pay tax.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. This act may be cited as the "Entertainment Industry Incentive Act of ~~2008~~ 2009.

Section 2. The following is hereby found and declared by the Legislature of Alabama:

(1) Although Alabama is filled with attractive natural resources, a growing workforce, and other resources attractive to the entertainment industry, Alabama has not developed its potential in terms of attracting the entertainment industry to the state by offering production incentives for qualified productions not previously offered in Alabama.

(2) Entertainment industry incentives offered by other states attract valuable projects to their states which stimulate local economies, use local manpower, offer other employment and entrepreneurial opportunities for state residents, and provide public awareness of the natural resources available in their states.

(3) Because Alabama does not currently offer a viable incentive package to the industry, Alabama cannot effectively compete with other states for attracting industry projects and those projects locate elsewhere.

(4) For Alabama to compete nationally or internationally for the location and production of more projects in Alabama and to foster a growing entertainment

industry in Alabama, industry specific production incentives are immediately necessary.

(5) The Legislature recognizes and confirms the planning and promotion of the entertainment industry are of vital importance to the economic development of Alabama as are the recruitment, expansion, and retention of industrial development within the state, and the promotion of the entertainment industry should be included as an integral part of any comprehensive economic development strategy plan promoted by the state and state agencies.

Section 3. For purposes of this act, the following terms shall have the following meanings:

(1) COMPANY. A corporation, partnership, limited liability company, or any other business entity.

(2) DEPARTMENT. The Alabama Department of Revenue.

(3) ENTERTAINMENT INDUSTRY. Those persons or entities engaged in the production of entertainment content as herein defined under paragraph a. of subdivision (8).

(4) EXPENDED IN ALABAMA. In the case of tangible property, property which is acquired or leased from a source within the State of Alabama; in the case of services, services performed for a qualified production project in the State of Alabama.

(5) OFFICE. The Alabama Film Office.

(6) PAYROLL. All salary, wages, and other compensation, including related benefits, including specifically, but not limited to, compensation and benefits provided to resident and nonresident producers, directors, writers, actors, and other personnel involved in qualified production projects in Alabama.

(7) PRODUCTION EXPENDITURES.

a. The term includes preproduction, production, and postproduction expenditures incurred in the State of Alabama that are directly used in a state-certified production, including, but not limited to, the following: Set construction and operation, wardrobe, makeup, set accessories, and related services; costs associated with photography and sound synchronization, lighting, and related services and materials; editing and related services; rental of facilities and equipment; leasing of vehicles; costs of food and lodging; cost of catering; digital or tape editing, film processing, transfer of film to tape or digital format; transfer direct to DVD, cable, or satellite for distribution; sound mixing, special and visual effects including duplication, film processing digital, DVD, music composition, and satellite distribution; total aggregate payroll; music; airfare; insurance costs of bonding; or other similar production expenditures as determined by rule or regulation.

b. The term includes financial contributions or educational or workforce development in partnership with related educational institutions, or local industry organizations, or both, contributed toward the furtherance of the local entertainment media industries.

c. The term does not include postproduction expenditures for marketing or any amounts that are paid to persons or entities as a result of their participation in profits from the exploitation of a motion picture production.

(8) QUALIFIED PRODUCTION.

a. The term means entertainment content created in whole or in part within the state, including motion pictures; soundtracks for motion pictures; documentaries; long-form, specials, miniseries, series, sound recordings, videos and music videos, and interstitials television programming; interactive television; interactive games; video games; commercials; infomercials; any format of digital media, including an interactive website that is intended for national or international distribution or exhibition to the general public; and any trailer, pilot, video teaser, or demo created primarily to stimulate the sale, marketing, promotion, or exploitation of future investment in either a product or a qualified production via any means and media in any digital media format, film, or videotape, provided such program meets all the underlying criteria of a qualified production.

b. The term does not include any ongoing television program created primarily as news, weather, or financial market reports, a production featuring current events, sporting events, an awards show or other gala event, a production whose sole purpose is fund-raising, a long-form production that primarily markets a product or service, a production used for corporate training or in-house corporate advertising or other similar productions; nor does the term include any production for which records are required to be maintained under 18 U.S.C. §2257 with respect to sexually explicit content; nor does the term mean or include any form of gambling, gaming, wagering, or pari-mutuel wagering activity or enterprise.

(9) QUALIFIED PRODUCTION COMPANY.

a. The term means a company engaged in the business of producing a Qualified Production, as that term is defined.

b. The term does not mean or include any company owned, affiliated, or controlled, in whole or in part, by any company or person which is in default on a loan.

(10) RESIDENT OF ALABAMA. A natural person and, for the purpose of determining eligibility for the incentives provided by this act, any person domiciled in the State of Alabama and any other person who maintains a permanent place of abode within the state and spends in the aggregate more than six months of each year within the State of Alabama.

(11) STATE-CERTIFIED PRODUCTION. A Qualified Production approved by the office, produced by a Qualified Production Company.

Section 4. (a) Beginning January 1, ~~2008~~ 2009, a Qualified Production Company shall be entitled to a rebate for Production Expenditures, as defined in this act, related to a State-Certified Production. The rebate shall be equal to 25 percent of the State-Certified Production's Production Expenditures excluding payroll paid to residents of Alabama plus 35 percent of all payroll paid to residents of Alabama for the State-Certified Production, provided the total Production Expenditures for a project must equal or exceed at least five hundred thousand dollars ($500,000), but must not exceed ten million dollars ($10,000,000). A single episode in a television series shall be considered a single production project for purposes of this section.

(b) A qualified production company shall be entitled to the rebate for production expenditures as provided in subsection (a) for a qualified project that is limited only to the production of a soundtrack used in a motion picture, provided that the production expenditures for the soundtrack project must equal or exceed at least fifty thousand dollars ($50,000), but must not exceed three hundred thousand dollars ($300,000).

(c) The rebate described in this section may be applied to any income tax liability applicable to a Qualified Production Company.

(d) If the rebate under this section exceeds a Qualified Production Company's Alabama income tax liability, the excess of rebate over liability shall be rebated to the Qualified Production Company.

(e) The Commissioner of the Department of Revenue shall promulgate rules necessary to administer this section.

Section 5. Commercial or financial information given in confidence that is not required to be disclosed pursuant to this act or any other state statute, and trade secrets, including, but not limited to, information relating to formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, customer lists, film or television scripts, or detailed production budgets shall be treated by the Office and the Department as proprietary and confidential.

Section 6. A Qualified Production Company that intends to expend in the aggregate one hundred fifty thousand dollars ($150,000) or more in connection with one or more Qualified Productions in the State of Alabama within a consecutive 12-month period, upon making application for, meeting the requirements of, and receiving written certification of that designation from the Office, shall be

exempted from the payment of state sales, use, and lodging taxes levied pursuant to Sections 40-23-2, 40-23-61, and 40-26-1, respectively, of the Code of Alabama 1975, on funds expended in Alabama in connection with the Qualified Productions.

Section 7. (a) A Qualified Production Company that intends to produce all or any part of a Qualified Production project in Alabama and desires to be exempted from the payment of state sales, use, and lodging taxes levied pursuant to Sections 40-23-2, 40-23-61, and 40-26-1, respectively, of the Code of Alabama 1975, shall provide an estimate of total expenditures expected to be made in Alabama in connection with the production project. The estimate of expenditures shall be filed with the Office before the commencement of the project in Alabama.

(b) At the time the Qualified Production Company provides the estimate of expenditures to the Department, it also shall designate a member or representative of the company to work with the Office and the Department on reporting of expenditures and other information necessary to take advantage of the sales, use, and lodging tax exemptions afforded by this act.

(c)(1) An application for the sales, use, and lodging tax exemptions provided herein may be accepted only from those Qualified Production Companies that report

anticipated expenditures in the State of Alabama in the aggregate equal to or exceeding one hundred fifty thousand dollars ($150,000) in connection with the production of one or more Qualified Production projects in the State of Alabama within a consecutive 12-month period.

(2) The application shall be approved by the Office.

(3) Once the application is approved by the Office, the Department shall issue sales, use, and lodging tax exemption certificates to the Qualified Production Company as evidence of the exemptions. The exemptions are effective on the date the certificate is issued by the Department.

(d) A Qualified Production Company that is approved and receives sales, use, and lodging tax exemption certificates, but fails to expend one hundred fifty thousand dollars ($150,000) within a consecutive 12-month period, is liable for the sales, use, and lodging taxes that would have been paid had the approval not been granted; except that the company must be given a 60-day period in which to pay the sales, use, and lodging taxes without incurring penalties. The sales, use, and lodging taxes are considered due as of the date the tangible personal property was purchased in or brought into Alabama for use, storage, or consumption for purposes of state sales and use taxes and due as of the date that lodgings occur for purposes of state lodging taxes.

(e) Upon completion of a Qualified Production, the company shall return the sales, use, and lodging tax exemption certificates to the Department and submit a report to the Office of the actual expenditures made in Alabama in connection with the Qualified Production.

(f) Notwithstanding any provision of Act 98-192 of the 1998 Regular Session (Acts 1998, p. 310), the sales and use tax exemption provided for herein shall only apply to the state sales and use tax.

Section 8. The Department and the Office may collectively promulgate rules as are necessary to implement and administer this act.

Section 9. For fiscal years ending September 30, ~~2008~~ 2009, the aggregate cap of incentives granted under the provisions of this bill shall not exceed five million dollars ($5,000,000) for all Qualified Production Companies. For fiscal years ending September 30, ~~2009~~ 2010, the aggregate cap of incentives granted under the provisions of this bill shall not exceed seven million five hundred thousand dollars ($7,500,000) for all Qualified Production Companies. For fiscal years ending September 30, ~~2010~~ 2011, and for all subsequent fiscal years thereafter, the aggregate cap of incentives granted under the provisions of this bill shall not exceed ten million dollars ($10,000,000) for all Qualified Production Companies.

Section 10. The following new sections are added to the Code of Alabama 1975, to read as follows:

§40-18-24.2.

(a) For purposes of this section and Section 40-18-24.3, the following terms shall have the following meanings:

(1) MEMBER. An individual, estate, trust, business trust as defined in Section 40-18-1, a corporation as defined in Section 40-18-1, or Subchapter K entity as defined in Section 40-18-1, that is a partner in a general, limited, limited liability, or limited liability limited partnership, or a member of a limited liability company.

(2) NONRESIDENT. a. An individual who is not a resident of or domiciled in this state during the applicable tax year; b. a nonresident trust as defined in Section 40-18-1; c. a nonresident estate as defined in Section 40-18-1; d. a foreign corporation as defined in Section 40-18-1, not commercially domiciled in this state during the applicable tax year; and e. a Subchapter K entity or business trust that is created or organized under the laws of a jurisdiction other than this state and that is not commercially domiciled in this state.

(3) PASS-THROUGH ENTITY. A partnership or other entity classified as a Subchapter K entity under Section 40-18-1. Neither estates nor trusts, including business

trusts, are included in this definition or subject to this section except in their capacity as a nonresident member, as herein defined, of a pass-through entity or lower-tier pass-through entity.

(4) QUALIFIED INVESTMENT PARTNERSHIP. A partnership or other entity classified as a Subchapter K entity, or a business trust as defined in Section 40-18-1, that meets all of the following requirements for the applicable tax period:

a. No less than 90 percent of the cost of the entity's total assets consists of qualifying investment securities and office facilities and tangible personal property reasonably necessary to carry on its activities in this state as an investment partnership.

b. No less than 90 percent of its gross income consists of interest, dividends, distributions, and gains and losses from the sale or exchange of qualifying investment securities, and management fees paid by its members.

c. An authorized officer, partner, member, or manager of the entity files on behalf of the entity a certification that it meets the above two criteria with respect to the tax period covered by the certification, in a form and at the time prescribed by the Department of Revenue.

(5) QUALIFYING INVESTMENT SECURITIES. Except as provided in Section 40-18-24.3, includes all of the following:

a. Common stock, including preferred or debt securities convertible into common stock; and preferred stock, including debt securities convertible into preferred stock.

b. Bonds, debentures, and other debt securities.

c. Deposits and any other obligations of banks and other financial institutions.

d. Stock and bond index securities, future contracts, derivative securities, warrants or options on securities, and other similar financial securities and instruments.

e. Interests in a Subchapter K entity that itself qualifies as a qualified investment partnership.

f. Other similar or related financial or investments contracts, instruments, or securities.

(b)(1) Except as provided in subsection (c), a pass-through entity shall file with the Department of Revenue, at the time the entity's annual return is required to be filed with the Department of Revenue for each taxable year, a composite income tax return on behalf of its nonresident members and shall report and pay the income tax imposed by this chapter at the highest applicable marginal rate provided in Section 40-18-5 on the nonresident members' distributive shares of the income of the pass-through entity apportioned and allocated at the entity level to this state under Chapter 27 of this title.

(2) A nonresident member that has been included in a composite income tax return filed pursuant to this section may file its own Alabama income tax return and shall receive credit for Alabama income tax paid on the member's behalf by the pass-through entity.

(3) The Department of Revenue may enter into agreements to permit the filing of annual composite income tax returns on behalf of one or more nonresident owners of pass-through entities who are not defined as nonresident members above, or of other forms of business entities the income of which is taxable at the owner level.

(c)(1) The pass-through entity shall be liable to the State of Alabama for the payment of the tax required to be remitted under this section, together with applicable interest and penalties, but shall not be liable to any such member for any amount withheld from distributions to or the distributive share of such member and remitted in compliance with this section. A member of a pass-through entity that is itself a pass-through entity (a "lower-tier pass-through entity") shall be subject to the same requirement to file a composite income tax return with respect to the distributive share of the apportioned and allocated income of the lower-tier pass-through entity. The Department of Revenue shall apply the Alabama income tax remitted by a pass-through entity on behalf of the lower-tier pass-through entity to the remittance

obligation imposed by this subsection on the lower-tier pass-through entity.

(2) A pass-through entity shall, at the time of payment pursuant to this section, deliver to the Department of Revenue a return on a form prescribed by the department showing the total amounts paid or credited to its nonresident members, the amounts of income tax remitted in accordance with this section, if any, and any other information the department may reasonably require. A pass-through entity shall furnish to its nonresident members annually, but not later than the 15th day of the third month after the end of its taxable year, a record of the amount of Alabama income tax remitted on behalf of such member, on a form prescribed by the department.

(3) Notwithstanding subsection (b), a pass-through entity shall not be required to remit Alabama income tax on behalf of a nonresident member if any of the following applies:

a. The Department of Revenue determines by regulation or ruling that the nonresident member's income should not be subject to composite return reporting, such as a member that is exempt from Alabama Income Tax.

b. The pass-through entity is a qualified investment partnership, or a publicly traded partnership as defined by 26 U.S.C. §7704(b) that is treated as a partnership for federal income tax purposes, which provides for inspection by the

Department of Revenue upon reasonable notice a list of the names of each of its nonresident owners or unit holders together with their addresses, taxpayer identification numbers, and other information reasonably requested by the department.

§40-18-24.3.

(a) Notwithstanding any other provision of this chapter to the contrary, including Sections 40-18-2 and 40-18-24.2, no income tax shall be due the State of Alabama from a nonresident member of a qualified investment partnership, or from the qualified investment partnership itself, with respect to the nonresident member's distributive share of interest, dividends, distributions, or gains and losses from qualifying investment securities owned by the entity, as long as the nonresident member does not actively participate in the day-to-day management of the entity. Provided, however, that in the event a qualified investment partnership invests in the qualifying investment securities of an entity that is majority owned by a nonresident member of the qualified investment partnership, income tax shall be due by such nonresident member with respect to the member's distributive share of any interest, dividends, distributions, or gains and losses from the qualifying investment securities of the other entity. For purposes of this section and Section 40-18-24.2, "majority owned" means ownership of more than 50

percent of the issued and outstanding voting stock of the other entity, applying the attribution rules of 26 U.S.C. §318.

(b) The terms "nonresident," "member," "qualified investment partnership," and "qualifying investment securities" shall have the same meanings ascribed to them in Section 40-18-24.2.

(c) The Department of Revenue shall promulgate reasonable rules to effectuate the intent of this section, including rules permitting certain corporate members of qualified investment partnerships to be eligible for the provisions of this section. Further, if the Commissioner of Revenue determines that this section is being used in an abusive fashion principally to avoid Alabama income tax liability, the commissioner shall have the authority to promulgate rules to distribute, apportion, or allocate gross income in order to clearly reflect the income of any such entity engaged in such tax avoidance.

Section 11. Section 40-2A-11, Code of Alabama 1975, is amended to read as follows:

"§40-2A-11.

(a) Failure to timely file return. If a taxpayer fails to file any return required to be filed with the department on or before the date prescribed therefor, determined with regard to any extension of time for filing,

there shall be assessed as a penalty the greater of 10 percent of any additional tax required to be paid with the return or fifty dollars ($50).

(b) Failure to timely pay tax.

(1) If a taxpayer fails to pay to the department the amount of tax shown as due on a return required to be filed on or before the date prescribed for payment of the tax, determined with regard to any extension of time for payment, there shall be added as a penalty one percent of the amount of the tax due if the failure to pay is for not more than one month, with an additional one percent for each additional month or fraction thereof during which failure to pay continues, not exceeding 25 percent in the aggregate. In lieu of the penalty provided in the immediately preceding sentence, for any tax for which a monthly or quarterly return is required, or for which no return is required, the department shall add a failure to timely pay penalty of 10 percent of the unpaid amount shown as tax due on the return or the amount stated in the notice and demand.

(2) If a taxpayer fails to pay to the department any amount of any tax required to be shown on any return, which is not so shown, within 30 calendar days from the date of the first notice and demand therefore, there shall be added as a penalty one percent of the amount of the tax due if the failure to pay is for not more than one month, with an

additional one percent for each additional month or fraction thereof during which failure to pay continues, not exceeding 25 percent in the aggregate. In lieu of the penalty provided in the immediately preceding sentence, for any tax for which a monthly or quarterly return is required, or for which no return is required, the department shall add a failure to timely pay penalty of 10 percent of the unpaid amount stated in the notice and demand unless payment is received within 30 calendar days from the date of the first notice and demand.

(c) Underpayment due to negligence. If any part of any underpayment of tax is due to negligence or disregard of rules or regulations, there shall be added to the tax an amount equal to five percent of that part of the tax attributable to negligence or disregard of rules or regulations.

For purposes of this subsection, the term "negligence" includes any failure to make a reasonable attempt to comply with Title 40, and the term "disregard" includes any careless, reckless or intentional disregard.

(d) Underpayment due to fraud. If any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of that portion of the underpayment which is attributable to fraud.

For purposes of this section, the term "fraud" shall have the same meaning as ascribed to the term under 26 U.S.C. Section 6663, as in effect from time to time.

(e) Frivolous return penalty. If a taxpayer files a "frivolous return," as that term is used in 26 U.S.C. Section 6702, that taxpayer may be liable for a penalty of up to two hundred fifty dollars ($250).

(f) Frivolous appeal penalty. If any appeal to the administrative law division or circuit court is determined to be frivolous or primarily for the purpose of delay or to impede collection of any tax, a penalty of two hundred fifty dollars ($250) or 25 percent of the tax in question, whichever is greater, shall be assessed in addition to any tax due.

(g) Penalties not exclusive. The penalties provided in this section for failure to timely file a return, failure to timely pay tax, filing a frivolous return, filing a frivolous appeal, or negligence may be asserted against the same taxpayer for the same tax period. If the fraud penalty is asserted, no other penalties shall be asserted.

(h) Waiver of penalties. Notwithstanding the foregoing, no penalty under this title or Section 10-2B-15.02 shall be assessed, or if assessed, shall be waived upon a determination of reasonable cause. Reasonable cause shall include, but not be limited to, those instances in which the

taxpayer has acted in good faith. The burden of proving reasonable cause shall be on the taxpayer.

(i) Discount sustained for just causes. All other provisions of tax laws notwithstanding, the Commissioner of the Department of Revenue, upon review of the circumstances involved, may authorize continuance of a statute-allowable discount when timely payment is made, but filing is delayed for just causes.

(j) Penalty and interest assessed as tax. All penalties and interest administered by the department shall be assessed and collected in the same manner as taxes.

(k) Penalty not to apply to registration and titling of motor vehicles. The penalties provided herein shall not apply to the registration or titling of motor vehicles.

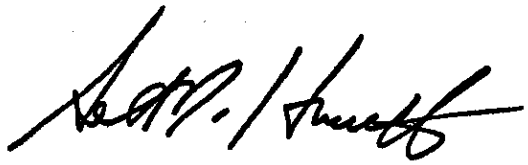
Section 12. All laws or parts of laws which conflict with this act are repealed, including, but not limited to, Act 2001-975, 2001 Regular Session, as amended by Act 2005-305, 2005 Special Session, and Section 40-18-24.1, Code of Alabama 1975.

Section 13. It is the express intent of the new Sections 40-18-24.2 and 40-18-24.3 of the Code of Alabama 1975, added by Section 10 to provide an offset for lost revenues provided by the incentives, rebates, and exemptions provided to the entertainment industry in this act.

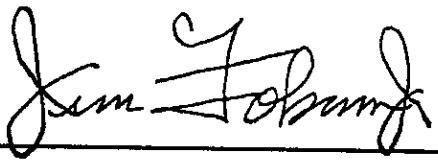
Section 14. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains.

Section 15. (a) Except as provided in subsection (b), this act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law, and shall apply retroactively to January 1, ~~2008~~ 2009, for purposes of qualifying for rebates, and sales, use, and lodging tax exemptions provided in this act.

(b) Section 40-18-24.2 and Section 40-18-24.3, Code of Alabama 1975, added by Section 10 of this act shall become effective for all tax years beginning after December 31, 2008, following its passage and approval by the Governor, or its otherwise becoming law.



Speaker of the House of Representatives



President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in and was passed by the House 17-FEB-09, as amended.

Greg Pappas
Clerk

Senate 10-MAR-09 Passed

APPROVED March 24, 2009

TIME 11:10 a.m.

GOVERNOR

Alabama Secretary Of State

Act Num....: 2009-144
Bill Num...: H-69

Recv'd 03/24/09 01:46pmJJB