



January 3, 2017

Lennie Collins
Director, Income Tax Division
North Carolina Department of Revenue
P.O. Box 871
Raleigh, NC 27602

The North Carolina Retail Merchants Association (NCRMA) respectfully submits the following written comments in response to the administrative rules pertaining to Market-Based Sourcing for Apportionment of Income proposed by the North Carolina Department of Revenue (DOR) as published in the *North Carolina Register* on October 3, 2016.

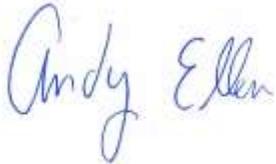
While the complexity of drafting clear and concise administrative rules to implement market based sourcing is sincerely acknowledged by NCRMA, the administrative rules as proposed unfortunately provide a large spectrum of uncertainty and subjectivity with regards to the authority of the North Carolina Secretary of Revenue (Secretary) to adjust a taxpayer's return. Specifically, 17 NCAC 05G .0503 provides unfettered and unchecked authority to the Secretary to make adjustments to a taxpayer's allocations when the Secretary deems such an adjustment to be "reasonable." Taken within the context of whether a "method of approximation" is considered "reasonable," one would assume the DOR to have unilateral ability in making unfavorable adjustments to a retailer's apportionment and sourcing, as such terms are inconclusive and open to wide interpretation. Because Secretaries of Revenue change over time, so does the interpretation of what is a "reasonable" adjustment. What one Secretary deems to be a reasonable adjustment may lead to a lengthy and costly audit at the expense of the taxpayer when a previous Secretary may take a different approach as to what is a reasonable adjustment which would not trigger such an audit. This result would certainly appear to fly in the face of one of the stated purposes behind the legislation requiring these administrative rules which would be to make North Carolina more attractive for location of service-based businesses and is a step backwards from the progress made by the DOR over the past four to six years of improving the way North Carolina's tax laws are applied to taxpayers in a fair and certain manner.

Additionally, 17 NCAC 05G .0505 which allows the Secretary to change a method of assignment on a prospective basis is also troubling to NCRMA. While it may not be the intention of DOR, 17 NCAC 05G .0505 has the effect of allowing the Secretary to effectively change the market base sourcing rules without proceeding through formal rule-making pursuant to the North Carolina Administrative Procedures Act under Chapter 150B of the North Carolina General Statutes. Businesses rely on certainty and providing the Secretary the authority to unilaterally change the law without going through rule making removes this necessary certainty without the

benefit of public comment at public hearings or the requirement that written comments be carefully considered concerning such a change. While a fiscal note was not required for these administrative rules, allowing a Secretary to effectively change these rules prospectively without the requirement of a fiscal note does not provide the necessary transparency to what the policy implications are of such a change. Such authority sends a negative signal that these may be the rules today but they could change without notice tomorrow and therefore a business structure that may be fine today may not be fine in North Carolina tomorrow.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in blue ink that reads "Andy Ellen". The signature is written in a cursive, flowing style.

Andy Ellen
President and General Counsel