WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

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FILED

Jun 9 4 25 PM '93

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Effective Date

August 11, 1993

NOTICE OF AN EMERGENCY RULE

AGENCY: State Tax Division TITLE NUMBER: 110

CITE AUTHORITY: W. Va. Code §§ 11-10-5 and 11-13C-5(j)

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES X☐ NO ☐

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 13C

TITLE OF RULE BEING AMENDED: Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Tax Credit.

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: ________

TITLE OF RULE BEING FILED AS AN EMERGENCY: ________

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 35TH DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

The Legislature when it enacted S.B. 463 amended W. Va. Code § 11-13C-5 to apply to tax years beginning after December 31, 1992, such amendment requiring the Tax Commissioner to promulgate legislative rules which require an alternative method of determining tax in certain situations. This rule provides necessary clarification of the alternative method. Because the statute is applicable to all tax years beginning after December 31, 1992 and involves considerable technical complexity, it is necessary for this rule to be effective in 1993, thereby avoiding confusion and preventing substantial harm to the public interest.

Use additional sheets if necessary

Signature

James H. Paige III
State Tax Commissioner

1610

State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

TAX DIVISION
P. O. Box 2389
Charleston, WV 25328-2389

JAMES H. PAIGE III
SECRETARY

FILED
JUL 9 4 25 PM '93
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

CONSENT TO FILE RULE

July 9, 1993

To Whom It May Concern:

Title of Rule:	Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Tax Credit
Title Number:	110
Series Number:	13C

Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this 9th day of July, 1993.

James H. Paige, III
Secretary, Tax and Revenue

STATEMENT OF CIRCUMSTANCES

The Legislature when it enacted S.B. 463 amended W. Va. Code § 11-13C-5 by requiring the Tax Commissioner to promulgate rules for an alternate method to determine tax under certain circumstances. This amendment accomplishes that purpose.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Tax Credit.

Type of Rule: X Legislative ____ Interpretive ____ Procedural

Agency: State Tax Division Address State Capitol Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL Increase	Decrease	FISCAL YEAR Current	Next	Thereafter
Estimated Total Cost	$	$	$	$	$
Personal Services	0	0	0	0	0
Current Expense	0	0	0	0	0
Repairs and Alterations	0	0	0	0	0
Equipment	0	0	0	0	0
Other	0	0	0	0	0

2. Explanation of above estimates:

   The costs should not vary from that envisioned by the Legislature when it amended W. Va. Code § 11-13C-5.

3. Objectives of these rules:

   Regulate the use of the alternative method for determining tax under certain situations.

4. Explanation of Overall Economic Impact of Proposed Rule.

   A. Economic Impact on State Government.

      While there may be an economic impact, there is not sufficient information to calculate its extent.

   B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

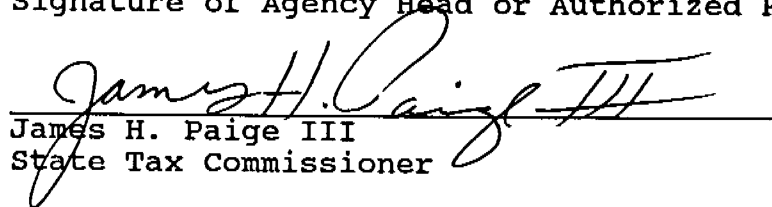
Those businesses authorized to take the subject tax credits may be affected.

C. Economic Impact on Citizens/Public at Large.

There should be no economic impact from this amendment.

Date: July 9, 1993

Signature of Agency Head or Authorized Representative



James H. Paige III
State Tax Commissioner

FILED

Jul 9 4 26 PM '93

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

DATE: July 9, 1993

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: State Tax Division

EMERGENCY RULE TITLE: Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Tax Credit

1. Date of filing: July 9, 1993

2. Statutory authority for promulgating the emergency rule: W.Va. Code § 11-10-5 and 11-13C-5(j)

3. Date of filing of proposed legislative rule: July 9, 1993

4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?
   Amends a current legislative rule.

5. Has the same or similar emergency rule previously been filed and expired?
   No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.

   N/A

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

N/A

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

The Legislature, when it enacted S.B. 463 amended W.Va. Code § 11-13C-5 to apply to tax years beginning after December 31, 1992, such amendment requiring the Tax Commissioner to promulgate legislative rules which require an alternative method of determining tax in certain situations. The rule provides necessary clarification of the alternative method. Because the statute is applicable to all tax years beginning after December 31, 1993 and involves considerable technical complexity, it is necessary for this rule to be effective in 1993, thereby avoiding confusion and preventing substantial harm to the public interest.

FILED

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATIVE REGULATIONS
STATE TAX DEPARTMENT
TITLE 110
SERIES 13C
1990

BUSINESS INVESTMENT AND JOBS EXPANSION TAX CREDIT
CORPORATION HEADQUARTERS RELOCATION TAX CREDIT
SMALL BUSINESS TAX CREDIT

Filed: February 21, 1990

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§ 110-13C-1. General.

1.1 Type of regulation. - These regulations are agency approved proposed legislative regulations as defined in West Virginia Code § 29A-3-1 et seq.

1.2 Scope. - These agency approved proposed legislative regulations explain and clarify the West Virginia Business Investment and Jobs Expansion Tax Credit, as stated in West Virginia Code § 11-13C-1 et seq. These regulations are issued pursuant to the mandate set forth in West Virginia Code § 11-13C-14(g), and generally address application of the West Virginia Business Investment and Jobs Expansion Tax Credit and related credits set forth in West Virginia Code, chapter 11, article 13C, on and after March 10, 1990. The provisions of these regulations apply to periods prior to March 10, 1990 only where the particular provision is expressly made applicable to prior periods. The provisions of these regulations do not supersede, abrogate or nullify rulings of the Tax Commissioner issued prior to the issuance of these regulations, and these regulations shall be so construed without regard to the express applicability of any provision of these regulations to periods prior to March 10, 1990. Specific written rulings of the Tax Commissioner issued prior to the issuance of these regulations shall remain in full force and effect, and shall supersede any conflicting provision of these regulations.

1.3 Authority. - These agency approved proposed legislative regulations are issued under the authority of West Virginia Code § 29A-3-15, West Virginia Code § 11-10-5 and West Virginia Code § 11-13C-14(g).

1.4 Filing date. - These agency approved proposed legislative regulations were filed in the State Register on February 21, 1990.

1.5 Effective date. - These agency approved proposed legislative regulations became effective upon being approved by the Legislature.

1.6 Citation. - These agency approved proposed legislative regulations may be cited as 110 C.S.R. 13C, § _____ (1990).

§ 110-13C-2. Overview of the credit.

The business investment and jobs expansion tax credit is available to a taxpayer or a group of project participant taxpayers against the portion of certain taxes imposed by this State which are attributable to and the consequence of the taxpayer's qualified investment in a new or expanded business in West Virginia which results in the creation of new jobs. The maximum

allowable credit is determined by multiplying the amount of the taxpayer's qualified investment by the taxpayer's new jobs percentage.

The amount of qualified investment is based on the useful life and the cost of real and personal property as follows:

USEFUL LIFE	PERCENTAGE OF COST WHICH CAN BECOME QUALIFIED INVESTMENT
Less than 4 years	0
4 to 6 years	33-1/3
6 to 8 years	66-2/3
8 years or more	100

Qualified investment for the purposes of the business investment and jobs expansion tax credit, generally consists of the investment of the taxpayer in real and tangible personal property, with certain exclusions, multiplied by the appropriate qualified investment percentage as described above. Leases of tangible personal property and real property can qualify as investment for purposes of the credit.

The percentage of qualified investment available as credit is determined by the number of new jobs created which are directly attributable to the taxpayer's qualified investment as follows:

IF THE NUMBER OF NEW JOBS IS:	THE APPLICABLE PERCENTAGE IS:
1,000	90
760	80
520	70
280	60
80	50

A new job must be filled by a West Virginia domiciled West Virginia resident and must be directly attributable to the making of new investment.

The credit is applied over a ten (10) year period (at 1/10th per year) beginning in the taxable year in which the qualified investment is placed in service or use, or, at the taxpayer's option, in the next succeeding tax year.

The business investment and jobs expansion tax credit may be used to offset up to eighty percent (80%) of the tax liability apportioned to the qualified investment for the following State taxes in the following order.

Business and Occupation Tax
Carrier Income Tax
Telecommunications Tax
Business Franchise Tax
Corporation Net Income Tax
Personal Income Tax
Sales and Use Taxes

The credit may offset the severance tax for certain taxpayers who have placed investment into service or use during certain time periods, generally, prior to March 10, 1990, or who are subject to certain statutory rules. The credit may also be sued as an indirect offset of up to twenty percent (20%) of workers' compensation premiums directly attributable to the qualified investment and eighty percent (80%) of ad valorem property tax attributable to the qualified investment, and eighty percent (80%) of unemployment insurance tax attributable to the qualified investment. The property tax, unemployment insurance tax and workers' compensation premiums are offset by means of a rebate of the remaining twenty percent (20%) of the business taxes listed above, except for the sales and use taxes, provided that sufficient credit for the year

remains available. Unused credit equal to the remainder of rebate credit for eighty percent (80%) of property tax, eighty percent (80%) of unemployment insurance tax and twenty percent (20%) of workers' compensation premiums not offset during the taxable year may be carried forward to the twelfth (12th) year subsequent to the year during which qualified investment was placed in service or use. The amount of taxes attributable to the new investment is determined by multiplying the total tax liability by a fraction, the numerator of which is the compensation paid to the employees hired as a result of the new investment, and the denominator of which is the compensation paid to all West Virginia employees of the taxpayer.

The statute provides for business investment and jobs expansion tax credit projects whereby multiple parties may engage in a business enterprise such that the parties together will create at least fifty (50) jobs and make qualified investment subject to the credit. A business entity may qualify as a project participant in a multiple party project by contributing either property, as a direct purchaser or lessee of qualified investment property, or jobs, as an employer, to a business investment and jobs expansion tax credit project.

The statute provides for multiple year projects wherein the qualified investment will be made over a period of up to three (3) tax years, rather than over a single taxable year. A project involving both multiple parties and multiple years can also be approved by the Tax Commissioner.

The regular business investment and jobs expansion tax credit is available for an entity or for project participants which make qualified investment in West Virginia and which create at least fifty (50) new jobs.

The small business tax credit is available for businesses which have an annual payroll and annual gross receipts not exceeding those maximums set forth in sections 3.2b and 7a of these regulations. This credit is available to businesses which make qualified investment which results in the creation of at least ten (10) new jobs. Only multiple year projects may be created by small business tax credit investors. Multiple party small business tax credit projects may not be created under the statute.

Effective February 1, 1986, a corporation that moves its corporate headquarters to West virginia from a location outside this State may be entitled to a credit. The amount of the credit varies depending on the number of new jobs created in West Virginia by relocation of the corporate headquarters. If the relocation creates at least fifteen (15) new jobs, but less than fifty (50) new jobs, or if the corporation headquarters relocation is part of a business development project being conducted in West Virginia by the corporation, which is also placed into service or use, during the same tax year that the corporate headquarters is relocated, which together result in at least fifty (50) new jobs being created, then the credit available is determined by multiplying the applicable "new jobs percentage" by the "adjusted qualified investment."

If the relocation creates at least fifteen (15) but less than fifty (50) new jobs, then the amount of credit is equal to ten percent (10%) of the corporation's adjusted qualified investment. The new jobs percentage will range from fifty percent (50%) for fifty (50) new jobs to ninety percent (90%) for one thousand (1,000) new jobs, although the taxpayer corporation may at its option choose to take the ten percent (10%) credit even though fifty (50) or more new jobs have been created.

The "adjusted qualified investment" means the qualified investment of the taxpayer in real and tangible personal property purchased for business expansion plus the cost of the reasonable and necessary expenses incurred by the taxpayer to relocate the corporate headquarters from its out-of-state location to West Virginia.

§ 110-13C-3. __Definitions__. - As used in these regulations and unless the context clearly requires a different meaning, the following terms shall have the

meaning ascribed herein, and shall apply in the singular or in the plural.

3.1 Business. - The term "business" means any activity taxable under article 12-a or 13 (or both) of chapter 11 of the West Virginia Code, which is engaged in by any person in this State: Provided, That on and after the July 1, 1987, the term "business" means any activity taxable under article 13, 13-a, 13-b, 21, 23 and 24 of this chapter (or any one or combination of such articles of this chapter).

3.2 Business expansion. - The term "business expansion" means capital investment in a new or expanded business facility in this State.

3.3 Business facility. - The term "business facility" means any factory, mining operation, mill, plant, refinery, warehouse, building or complex of buildings located within this State, including the land on which it is located, and all machinery, equipment and other real and personal property located at or within such facility, used in connection with the operation of such facility, in a business that is taxable in this State, and all site preparation and start-up costs of the taxpayer for the business facility which it capitalizes for federal income tax purposes.

3.3.1 "Mining operation" means the place at which a person extracts ores or minerals from the ground. It includes both surface and underground mining operations.

3.3.2 "Surface mine" means the surface of land upon which activities are conducted which disturb the natural surface of the land and result in the production of ores or minerals.

3.3.3 "Underground mine" means the surface effects associated with the shafts, slopes, lifts or inclines connected with excavations penetrating seams or strata of minerals, and the equipment connected therewith which contribute to the mining, preparation or handling or ores or minerals.

3.4 Commissioner or Tax Commissioner. - The terms "Commissioner" and "Tax Commissioner" are used interchangeably herein and mean the Tax Commissioner of the State of West Virginia, or his delegate.

3.5 Compensation. - The term "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

3.6 Construction contract. - The term "construction contract" means any contract for the building, construction, reconstruction or rehabilitation of, or the installation of any integral components to, or improvements of, a new or existing business facility.

3.7 Controlled group. - The term "controlled group" means one or more chains of corporations connected through stock ownership with a common parent corporation if stock possessing at least fifty percent (50%) of the voting power of all classes of stock of each of the corporations is owned directly or indirectly by one (1) or more of the corporations; and the common parent owns directly stock possessing at least fifty percent (50%) of the voting power of all classes of stock of at least one (1) of the other corporations.

3.8 Corporation. - The term "corporation" means any corporation, joint-stock company or association, and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by a certificate of interest or ownership or similar written instrument.

3.9 Delegate. - The term "delegate" in the phrase "or his delegate," when used in reference to the Tax Commissioner, means any officer or employee of the Department of Tax and Revenue duly authorized by the Tax Commissioner directly, or indirectly by one or more redelegations of authority, to perform the

functions mentioned or described in West Virginia Code, chapter 11, article 13C.

3.10 Eligible taxpayer. - The term "eligible taxpayer" means any person subject to the taxes imposed by West Virginia Code, chapter 11, article 12a or 13 (or both) who makes qualified investment in a new or expanded business facility located in this State that results in the creation of at least fifty (50) new jobs: Provided, That on and after July 1, 1987, the phrase "eligible taxpayer" means any person subject to the taxes imposed by West Virginia Code, chapter 11, articles 13, 13-a, 13-b, 21, 23 and 24 (or any one (1) or combination of such articles of this chapter). "Eligible taxpayer" shall also include an affiliated group of taxpayers if such group elects to file a consolidated corporation net income tax return under West Virginia Code, chapter 11, article 24.

3.11 Expanded facility. - The term "expanded facility" means any business facility (other than a new or replacement business facility) resulting from the acquisition, construction, reconstruction, installation or erection of improvements or additions to existing property if such improvements or additions are purchased on or after March 1, 1985, but only to the extent of the taxpayer's qualified investment in such improvements or additions.

3.12 Includes and including. - The terms "includes" and "including," when used in a definition contained in West Virginia Code, chapter 11, article 13C or these regulations, shall not be deemed to exclude other things otherwise within the meaning of the term defined.

3.13 Leased property. - For property leased or purchased pursuant to a so-called capital lease, as determined under generally accepted accounting principles, on or after March 10, 1990, the term "leased property" does not include property which the taxpayer is required to show on its books and records as an asset under generally accepted principles of financial accounting. If the taxpayer is prohibited from expensing the lease payments for federal income tax purposes, the property shall be treated as purchased property under this section if the property was purchased or leased on or after March 10, 1990. Property leased prior to March 10, 1990 shall be treated as leased property without regard to whether the lease is a capital lease or an operating lease.

3.14 New business facility. - The term "new business facility" means a business facility which satisfies all the requirements of subsections 3.14.1, 3.14.2, 3.14.3 and 3.14.4 of this Section 3.14.

3.14.1 The facility is employed by the taxpayer in the conduct of a business the net income of which is or would be taxable pursuant to West Virginia Code, chapter 11, article 21 or 24. Such facility shall not be considered a new business facility in the hands of the taxpayer if the taxpayer's only activity with respect to such facility is to lease it to another person or persons. This restriction will not apply where the lease is between project participants and the lessee's lease payments do not constitute qualified investment, and investment in the property will qualify only at the level of third party transactions between a participant and an entity outside of the circle of project participants under 3.14.3 of these regulations.

3.14.2 For periods subsequent to March 9, 1990, such facility is purchased by, or leased to, the taxpayer and placed in service or use on or after March 1, 1985. For periods prior to March 10, 1990, such facility was placed in service or use on or after March 1, 1985, without regard to the time of purchase or leasing.

3.14.3 The facility was not purchased or leased by the taxpayer from a related person or a project participant, or related person of a project participant, in any certified project in which the taxpayer is a participant. The Tax Commissioner may waive this requirement if the facility was acquired from a related party for its fair market value and the acquisition was not tax motivated. Note that this provision does not disqualify investment in property

purchased or leased by a project participant from an unrelated outside third party. However, the investment in lease or sublease payments between project participants in such property resulting from a subsequent lease arrangement would not qualify; nor would the purchase of such property by one project participant from another project participant qualify.

3.14.3.1 Given the statutory mandate for a reasonable construction of the business investment and jobs expansion tax credit statute enacted by the Legislature in West Virginia Code § 11-13C-14(b) on March 10, 1990, the Tax Commissioner shall exercise the discretion granted in this section of these regulations and West Virginia Code §§ 11-13C-3(b)(12)(C) and 11-13C-14(e)(3)(C) by refusing to grant any waiver of the proscription set forth therein except in extraordinary circumstances.

3.14.4 Such facility was not in service or use during the ninety (90) days immediately prior to transfer of the title to such facility, or prior to the commencement of the term of the lease of such facility: Provided, That this ninety (90) day period may be waived by the Tax Commissioner prior to March 10, 1990 for good and sufficient cause, and subsequent to March 9, 1990 if the Commissioner determines that persons employed at the facility may be treated as "new employees" as that term is defined in West Virginia Code § 11-13C-14 and elsewhere in West virginia Code, chapter 11, article 13C and in these regulations for periods subsequent to March 9, 1990.

3.14.5 Notwithstanding the provisions of subparagraphs 3.14.1, 3.14.2, 3.14.3 and 3.14.4 of this Section 3.14, the purchase or leasing of a facility or of property from a nonparticipant unrelated party by a participant in a certified project who then leases, subleases or sells such property to a participant in the same certified project may constitute qualified investment in a new business facility or in property purchased or leased for business expansion or in new property, as defined in these regulations if such facility or property otherwise qualifies as such in accordance with West Virginia Code article 11-13C and these regulations; and lease, sublease or purchase price payments between project participants shall not constitute qualified investment.

3.15 New employee.

3.15.1 The term "new employee" means a person residing and domiciled in this State, hired by the taxpayer to fill a position for a job in this State which previously did not exist in the taxpayer's business enterprise in this State prior to the date on which the taxpayer's qualified investment is placed in service or used in this State. In no case shall the number of new employees directly attributable to such investment for purposes of this credit exceed the total net increase in the taxpayer's employment in this State: Provided, That with respect to taxpayers who file application for certification of a project under West Virginia Code § 11-13C-4b after March 10, 1990, and other taxpayers which place qualified investment into service or use after March 10, 1990, the Tax Commissioner may require that the net increase in the taxpayer's employment in this State be determined and certified for the taxpayer's controlled group; and in the case of a project involving more than one (1) person for the controlled groups of all participants, taken as a whole: Provided, however, That persons filling jobs saved as a direct result of taxpayer's qualified investment in property purchased or leased for business expansion on or after March 10, 1990 may be treated as new employees filling new jobs if the taxpayer certifies the material facts to the Tax Commissioner and the Tax Commissioner expressly finds that:

3.15.1.1 But for the new employer purchasing the assets of a business in bankruptcy under chapter seven or eleven of the United States Bankruptcy Code and such new employer making qualified investment in property purchased or leased for business expansion, the assets would have been sold by the United States bankruptcy court in a liquidation sale and the jobs so saved would have been lost; or

3.15.1.2 But for taxpayer's qualified investment in property purchased or leased for business expansion in this State, taxpayer would have closed its business facility in this State, taxpayer would have closed its business facility in this State and the employees of the taxpayer located at such facility would have lost their jobs: Provided, That the Tax Commissioner shall not make this certification unless the Tax Commissioner finds that the taxpayer is insolvent as defined in 11 U.S.C. § 101(31) or that the taxpayer's business facility was destroyed in whole or in significant part by fire, flood or other act of God.

3.15.1.2.a This Section 3.15.1.2 shall apply when,

But for the making of qualified investment in property purchased or leased for business expansion in this State, the business facility in which such property purchased or leased for business expansion is placed in service or use, or which itself constitutes property purchased or leased for business expansion, would have closed and the employees at the facility would have lost their jobs: Provided, That the Tax Commissioner shall not make this certification unless the Tax Commissioner finds that the entity which owned the facility prior to the making of the qualified investment was insolvent as defined in 11 U.S.C. § 101(31) immediately prior to the making of such qualified investment, or that the business facility was destroyed in whole or in significant part by fire, flood or other act of God.

3.15.1.3 Jobs relating to an insolvent business may be saved by:

3.15.1.3.a The purchase of the assets of an insolvent entity by an unrelated entity, with or without the making of additional capital investment to be added to those assets, with the resulting continuation of employment and operations formerly maintained by the insolvent entity;

3.15.1.3.b The purchase of, or merger of, an insolvent entity, by or with an unrelated entity, and the resulting continuation of operations formerly carried out by the formerly insolvent entity, and a resulting continuation of employment; or

3.15.1.3.c Purchase of the assets of an insolvent entity by a partnership, or the joining of an insolvent entity with a partnership, as a partner, whereby the assets, or assets and liabilities, of the insolvent entity, as a partner, are absorbed by and become assets and liabilities of the partnership which, subsequent to the addition of the insolvent entity as a partner, shall not be insolvent, with the resultant continuation of employment and operations relating to the formerly insolvent entity.

3.15.1.4 Whether a facility was destroyed in whole, or in significant part, by an act of God depends on the facts and circumstances of each case.

3.15.2 A person shall be deemed to be a "new employee" only if such person's duties in connection with the operation of the business facility are on:

3.15.2.1 A regular, full-time and permanent basis; or

3.15.2.2 A regular, part-time and permanent basis: Provided, That such person is customarily performing such duties at least twenty hours per week for at least six (6) months during the taxable year.

3.15.2.3 "Full-time employment" means employment for at least one hundred forty (140) hours per month at a wage not less than the prevailing state or federal minimum wage, depending on which minimum wage provision is applicable to the business: Provided, That for new jobs filled prior to March 10, 1990, "full-time employment" means employment for at least one hundred twenty (120) hours per month at a wage not less than the prevailing state or

federal minimum wage, depending on which minimum wage provision is applicable to the business.

3.15.2.4 "Permanent employment" does not include employment that is temporary or seasonal and therefore the wages, salaries and other compensation paid to such temporary or seasonal employees will not be considered for purposes of this credit.

3.16 <u>New job</u>. - The term "new job" means a job which did not exist in the business of the taxpayer in this State prior to the taxpayer's qualified investment being made, or which is a saved job as discussed in Section 3.15 and the subsections thereof of these regulations and West Virginia Code § 11-13C-14(e)(4), and which is filled by a new employee.

3.17 <u>New property</u>. - The term "new property" means:

3.17.1 Property the construction, reconstruction or erection of which is completed on or after March 1, 1985 and which was placed in service or use after such date; and

3.17.2 Property leased or acquired by the taxpayer that is placed in service or use in this State on or after March 1, 1985, if the original use of such property commences with the taxpayer and commences on or after such date.

3.17.3 New property must constitute property purchased or leased for business expansion in order for investment in such property to qualify for this credit.

3.18 <u>Original use</u>. - The term "original use" means the first use to which the property is put, whether or not such use corresponds to the use of the property by the taxpayer.

3.19 <u>Partnership and partner</u>. - The term "partnership" includes a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business, financial operation or venture is carried on, and which is not a trust or estate, a corporation or a sole proprietorship. The term "partner" includes a member in such a syndicate, group, pool, joint venture or organization.

3.20 <u>Person</u>. - The term "person" includes any natural person, corporation or partnership.

3.21 <u>Property purchased or leased for business expansion</u>.

3.21.1 <u>Included property</u>. - Except as provided in subparagraph 3.21.2, the term "property purchased or leased for business expansion" means real property, and improvements thereto, and tangible personal property, but only if such real or personal property was constructed, purchased, or leased and placed in service or use by the taxpayer, for use as a component part of a new or expanded business facility, as defined in this section, which is located within West Virginia. This term includes only:

3.21.1.1 Real property, and improvements thereto having a useful life of four or more years, placed in service or use on or after March 1, 1985, by the taxpayer.

3.21.1.2 Real property, and improvements thereto, or tangible personal property acquired by written lease having a primary term of ten (10) or more years and placed in service or use by the taxpayer on or after March 1, 1985.

3.21.1.3 Tangible personal property placed in service or use by the taxpayer on or after March 1, 1985, with respect to which depreciation, or

amortization in lieu of depreciation, is allowable in determining the personal or corporation net income tax liability of the business taxpayer under West Virginia Code, chapter 11, article 21 or 24, and which has a useful life, at the time such property is placed in service or use in this State, of four (4) or more years.

3.21.1.4 Tangible personal property acquired by written lease having a primary term of four (4) years or longer, that commenced and was executed by the parties thereto on or after February 1, 1986, if used as a component part of a new or expanded business facility, shall be included within this definition.

3.21.1.5 Tangible personal property owned, or leased, and used by the taxpayer at a business location outside this State which is moved into this State on or after February 1, 1986, for use as a component part of a new or expanded business facility located in this State: Provided, That if the property is owned, it must be depreciable or amortizable personal property for income tax purposes, and have a useful life of four (4) or more years remaining at the time it is placed in service or use in this State; and if the property is leased, the primary term of the lease remaining at the time the leased property is placed in service or use in this State must be four (4) or more years.

3.21.2 Excluded property. - The term "property purchased or leased for business expansion" shall not include:

3.21.2.1 Property owned or leased by the taxpayer and for which the taxpayer was previously allowed tax credit for industrial expansion, tax credit for industrial revitalization, tax credit for coal loading facilities or the tax credits allowed by West Virginia Code § 11-13C-1 et seq. (the business investment and jobs expansion tax credit or supercredit, small business credit and corporate headquarters relocation credit).

3.21.2.2 Property owned or leased by the taxpayer and for which the seller, lessor, or other transferor, was previously allowed tax credit for industrial expansion, tax credit for industrial revitalization, tax credit for coal loading facilities, or the tax credits allowed by West Virginia Code § 11-13-1 et seq. (the business investment and jobs expansion tax credit or supercredit, the small business tax credit or the corporate headquarters relocation credit).

3.21.2.3 Repair costs, including materials used in the repair, unless for federal income tax purposes the cost of the repair must be capitalized and not expensed.

3.21.2.4 Airplanes.

3.21.2.5 Property which is primarily used outside this State, with use being determined based upon the amount of time the property is actually used both within and without this State.

3.21.2.6 Property which is acquired incident to the purchase of the stock or assets of the seller, unless for good cause shown, the Tax Commissioner consents to waiving this requirement.

3.21.2.7 Natural resources in place purchased or leased prior to March 1, 1985, and placed in service or use after March 9, 1990, or purchased or leased after March 1, 1985 pursuant to an option to purchase or lease such natural resources in place acquired prior to March 1, 1985 but exercised in whole or in part on or after March 10, 1990, and not subject to the transition rules of West Virginia Code § 11-13C-14(c)(2) unless pursuant to a written contract to purchase or lease executed prior to March 10, 1990, and subject, to one (1) or more of the transition rules set forth in West Virginia Code § 11-13C-14(c)(2). Property purchased or leased prior to March 1, 1985, but placed in service or use on or after March 1, 1985 and prior to March 10, 1990

may constitute property purchased or leased for business expansion if other requirements for such property are otherwise met.

3.21.2.8 Property purchased or leased on or after March 10, 1990, and not subject to the transition rules of West Virginia Code § 11-13C-14(c)(2) unless pursuant to a written contract to purchase or lease executed prior to March 10, 1990, and subject, to one (1) or more of the transition rules set forth in West Virginia Code § 11-13C-14(c)(2), the cost or consideration for which cannot be quantified with any reasonable degree of accuracy at the time such property is placed in service or use: Provided, That when the contract of purchase or lease specifies a minimum purchase price or minimum annual rent, the amount thereof shall be used to determine the qualified investment in such property under West Virginia Code § 11-13C-6 if the property otherwise qualifies as property purchased or leased for business expansion.

3.21.3 Assumption of liabilities of the seller by the purchaser of property purchased or leased for business expansion in consideration for such property will count toward the cost of such property in determining qualified investment.

3.21.4 Investment in intangibles is excluded from the measure of property purchased or leased for business expansion.

3.21.5 Purchase date. - Property shall be deemed to have been purchased prior to a specified date only if:

3.21.5.1 The physical construction, reconstruction or erection of the property was begun prior to the specified date, or such property was constructed, reconstructed, erected or acquired pursuant to a written contract as existing and binding on the purchase prior to the specified date;

3.21.5.2 The machinery or equipment was owned by the taxpayer prior to the specified date or was acquired by the taxpayer pursuant to a binding purchase contract which was in effect prior to the specified date; or

3.21.5.3 In the case of leased property, there was a binding written lease or contract to lease identifiable property in effect prior to the specified date.

3.22 Purchase. - The term "purchase" means any acquisition of property, but only if:

3.22.1 The property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of deductions under Section 267 or 707(b) of the United States Internal Revenue Code of 1954, as amended, and in effect on January 1, 1985.

3.22.2 The property is not acquired by one (1) component member of a controlled group from another component member of the same controlled group. The Tax Commissioner can waive this requirement if the property was acquired from a related party for its then fair market value; and

3.22.2.1 Given the statutory mandate for a reasonable construction of the business investment and jobs expansion tax credit statute enacted by the Legislature in West Virginia Code § 11-13C-14(b) on March 10, 1990, the Tax Commissioner shall exercise the discretion granted in this section of these regulations and West Virginia Code § 11-13C-3(b)(20)(B) by refusing to grant any waiver of the proscription set forth therein except in extraordinary circumstances.

3.22.3 The basis of the property for federal income tax purposes, in the hands of the person acquiring it is not determined:

3.22.3.1 In whole or in part by reference to the federal

adjusted basis of such property in the hands of the person from whom it was acquired; or

3.22.3.2 Under Section 1014(e) of the United States Internal Revenue Code of 1954, as amended, and in effect on January 1, 1985.

3.23 Qualified activity. - The term "qualified activity" means any business or other activity subject to the tax imposed by article 12-a or 13 (or both) of West Virginia Code, chapter 11: Provided, That on and after July 1, 1987, the phrase "qualified activity" means any business or other activity subject to the tax imposed by articles 13, 13-a, 13-b, 21, 23 and 24 of West Virginia Code, chapter 11 (or any one (1) or combination of such articles), but not the activity of merely holding employment as an employee subject to personal income tax and subject to withholding by the employer.

3.24 Related person. - The term "related person" means:

3.24.1 A corporation, partnership association or trust controlled by the taxpayer;

3.24.2 An individual corporation, partnership, association or trust that is in control of the taxpayer;

3.24.3 A corporation, partnership, association or trust controlled by an individual, corporation, partnership, association or trust that is in control of the taxpayer; or

3.24.4 A member of the same controlled group as the taxpayer.

For purposes of Sections 3.22 and 3.25 of these regulations, "control," with respect to a corporation means ownership, directly or indirectly, of stock possessing fifty percent (50%) or more of the total combined voting power of all classes of the stock of such corporation entitled to vote. "Control," with respect to a trust, means ownership, directly or indirectly, of fifty percent (50%) or more of the beneficial interest in the principal or income of such trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association or of a beneficial interest in a trust shall be determined in accordance with the rules for constructive ownership of stock provided in Section 267(c) of the United States Internal Revenue Code of 1954, as amended, other than paragraph (3) of such section.

3.25 Replacement facility. - The term "replacement facility" means any property (other than an expanded facility) that replaces or supersedes any other property located within this State that:

3.25.1 The taxpayer or a related person used in or in connection with any activity for more than two (2) years during the period of five (5) consecutive years ending on the date the replacement or superseding property is placed in service by the taxpayer.

3.25.2 Is not used by the taxpayer or a related person in or in connection with any qualified activity for a continuous period of one (1) year or more commencing with the date the replacement or superseding property is placed in service by the taxpayer.

3.26 Small business.

3.26.1 July 1, 1987 to March 9, 1990. - For periods prior to March 10, 1990, and after June 30, 1987, the term "small business" means a small business which has either annual payroll or annual gross receipts of not more than the following amounts for the first tax year when investment is first placed in service or use and beginning during a period listed. **Refer to Section 7a of these regulations for material relating to small businesses.**

Period	Annual Payroll	Annual Gross Receipts
July 1, 1987 to December 31, 1988	$1,500,000	$5,000,000
January 1, 1989 to December 31, 1989	$1,562,050	$5,206,850
January 1, 1990 to March 9, 1990	$1,637,150	$5,457,250

3.26.1.1 Annual payroll. - For small businesses which have placed investment into service or use before March 10, 1990, or which are subject to a transition rule set forth in West Virginia Code § 11-13C-14(c)(2), the annual payroll of a business shall include the employees of the business whether employed on a full-time, part-time, temporary, or other basis, during the preceding twelve (12) months, the payroll of the business shall be divided by the number of weeks, including fractions of a week, that it has been in business, and the result multiplied by fifty-two (52).

3.26.1.2 Annual gross receipts. - For small businesses which have placed investment into service or use before March 10, 1990, or which are subject to a transition rule set forth in West Virginia Code § 11-13C-14(c)(2), the annual gross receipts of a business shall be calculated as follows:

3.26.1.2.a The "annual gross receipts" of a business which has been in business for three (3) or more complete fiscal years means the highest annual gross revenues of the business from among the last three (3) fiscal years. For purposes of this definition, the gross revenues of the business includes revenues from sales of tangible personal property and services, interest, rents, royalties, fees, commissions and receipts from any other source, but less returns and allowances, sales of fixed assets, interaffiliated transactions between a business and its domestic and foreign affiliates, and taxes collected for remittance to a third party, as shown on its books for federal income tax purposes.

3.26.1.2.b The annual receipts of a business that has been in business for less than three (3) complete fiscal years means its total receipts for the period it has been in business, divided by the number of weeks including fractions of a week that it has been in business, and multiplied by fifty-two (52).

3.26.2 Subsequent to March 10, 1990. - The term "small business" means a small business which has an annual payroll of one million seven hundred thousand dollars ($1,700,000) or less, and annual gross receipts of not more than five million five hundred thousand dollars ($5,500,000): Provided, That on or before January 15, 1991, and on or before each January 5th thereafter, the Tax Commissioner shall prescribe amounts which shall apply in lieu of the above amounts for taxable years beginning on or after January 1 of the calendar year in which the determination is made: Provided, however, That this determination shall not apply to small business projects which have received certification from the Tax Commissioner prior to March 10, 1990, if the said small business projects which have previously received certification continue to meet the requirements of a small business as in effect at the time of the certification of the project. Such prescribed amounts shall be determined in accordance with West Virginia Code article 11-13C and notice thereof shall be filed in the State Register. For purposes of this definition:

3.26.2.1 Annual payroll. - For small businesses which place qualified investment into service or use after March 9, 1990, and which are not subject to a transition rule set forth in West Virginia Code § 11-13C-14(c)(2), the annual payroll of a business shall include the employees of its domestic and foreign affiliates, whether employed on a full-time, part-time, temporary, or other basis, during the preceding twelve (12) months, the payroll of the business shall be divided by the number of weeks, including fractions of a week, that it has been in business, and the result multiplied by fifty-two (52). That amount shall then be added to the twelve (12) month payrolls of its domestic and foreign affiliates to determine the annual payroll of the business for purposes

of this section.

3.26.2.2 <u>Annual gross receipts</u>. - The annual gross receipts of a business shall include the annual gross receipts of its foreign and domestic affiliates.

3.26.2.2.a The "Annual gross receipts" of a business which has been in business for three (3) or more complete fiscal years means the highest annual gross revenues of the business for the last three (3) fiscal years. For purposes of this definition, the gross revenues of the business includes revenues from sales of tangible personal property and services, interest, rents, royalties, fees, commissions and receipts from any other source, but less returns and allowances, sales of fixed assets, interaffiliated transactions between a business and its domestic and foreign affiliates, and taxes collected for remittance to a third party, as shown on its books for federal income tax purposes.

3.26.2.2.b The annual receipts of a business that has been in business for less than three (3) complete fiscal years means its total receipts for the period it has been in business, divided by the number of weeks including fractions of a week that it has been in business, and multiplied by fifty-two (52).

3.26.2.2.c The annual payroll, annual gross receipts and annual median compensation requirements applicable to any small business except a certified project credit taker under Section 3.26.2 of these regulations shall, be determined when qualified investment is first placed in service or use, and the subsequently redetermined inflation adjusted amounts for each year, shall be the requirements applicable to that business for each year throughout the ten (10) year credit period and any further carryover or other extended credit period for the original credit to which the requirements relate.

3.26.2.3 <u>Affiliates</u>. - The term "affiliates" includes all concerns which are affiliates of each other when either directly or indirectly one concern controls or has the power to control the other or a third party or parties controls or has the power to control both. In determining whether concerns are independently owned and operated and whether or not affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management and contractual relations.

3.26.2.4 <u>Concern</u>. - The term "concern" means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity), having a place of business located in this State, and which makes a contribution to the economy of this State through payment of taxes, or the sale or use in this State of tangible personal property, or the procurement or providing of services in this State, or the hiring of employees who work in this State. "Concern" includes but is not limited to any person as defined in West Virginia Code § 11-13C-3(b)(18).

3.27 <u>Taxpayer</u>. - The term "taxpayer" means any person subject to taxes imposed by West Virginia Code articles 11-13, 11-13a, 11-13b, 11-21, 11-23 or 11-24 or any one or combination thereof.

3.28 <u>This Code</u>. - The term "this Code" means that the Code of West Virginia, 1931, as amended.

3.29 <u>This State</u>. - The term "this State" means the State of West Virginia.

3.30 <u>Used property</u>. - The term "used property" means property acquired after February 28, 1985, that is not "new property."

§ 110-13C-4. <u>Amount of credit allowed - when investment is placed in service - time period over which investment can be placed in service</u>.

4.1 Amount of credit. - The amount of credit allowable is determined by multiplying the amount of the taxpayer's "qualified investment" (determined under West Virginia Code § 11-13C-4a or 6, or both and these regulations) in "property purchased or leased for business expansion" (as defined in West Virginia Code § 11-13C-3 and 14 and these regulations) by the taxpayer's new jobs percentage (determined under West Virginia Code § 11-13C-7, 4a or 7a and these regulations). The product of this calculation establishes the maximum amount of credit allowable under West Virginia Code article 11-13C, due to the qualified investment.

4.2 Application of credit over ten years. - The amount of credit allowable must be taken over a ten (10) year period, with certain extensions of this period for carryover rebate credit, credit arising from non-quantifiable investment and multiple year project credit, at the rate of one-tenth (1/10th) of the amount thereof per taxable year (except that rebate credit is not limited by this one-tenth requirement), beginning with the taxable year in which the taxpayer places the qualified investment in service or use in this State, unless the taxpayer elected to delay the beginning of the ten (10) year period until the next succeeding taxable year, except that project credit for a project available under West Virginia Code § 11-13C-4b(e)(2) shall begin to be taken in the year specified therein. This election shall, for all credit taken under West Virginia Code article 11-13C, except the small business credit under Section 7a thereof, be made in the annual income tax return filed for the taxable year in which credit is first taken on the qualified investment placed into service or use by the taxpayer. Once made, the election cannot be revoked. The annual credit allowance shall be taken in the manner prescribed in West Virginia Code article 11-13C. For credit taken under West Virginia Code 11-13C-7a, the election to delay the beginning of the ten (10) year period shall be made in the annual income tax return filed for the taxable year in which qualified investment is first placed in service or use.

4.2.1 For a nonproject business investment and jobs expansion tax credit, the entity making the actual investment is the entity which is entitled to take the credit. The credit cannot be shared among, or assigned to, other entities. Also, the entity making the investment and taking the credit must also be the entity which is the employer of the persons holding new jobs attributable to investment.

4.3 Time over which investment is placed in service or use. - Property shall be considered placed in service or use in the earlier of the following taxable years:

4.3.1 The taxable year in which, under the taxpayer's federal income tax depreciation practice, the period for depreciation with respect to such property begins; or

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

4.3.3 In the case of a nonproject credit or a multiple party single year certified project, investment may be placed in service or use over a period of 365 days, beginning on the date when any portion or item of property purchased or leased for business expansion is first placed into service or use.

4.3.3.1 Any investment made subsequent to the end of the taxable year under West Virginia Code § 11-13C-4 (a three hundred and sixty-five (365) day year) must be excluded from the measure of qualified investment, and no business investment and jobs expansion tax credit is available for it.

The only circumstance where investment place in service or use over a period of more than one (1) year can qualify for the business investment and jobs expansion tax credit is where a multiple year business investment and jobs expansion tax credit project has been approved by the Tax Commissioner under

West Virginia Code § 11-13C-4b. Refer to section 4b of these regulations for a discussion of multiple year projects.

4.3.4 In the case of a multiple party certified project, project investment will be treated as having been placed in service or use beginning on the date when any portion or item of property purchased or leased for business expansion is first placed in service or use by a project participant. The period for placement of such property into service or use then ends with the expiration of 365 days, including the day investment is first placed in service or use.

4.3.5 In the case of a multiple year, non-multiple party certified project, the "three (3) year" multiple year investment period begins on the date when any portion or item of property purchased or leased for business expansion is first placed into service or use. The multiple year investment period ends with the end of the taxpayer's second tax year subsequent to the taxpayer's first tax year during which such property is first placed in service or use. Thus, the "three (3) year" multiple year investment period may be as long as three (3) full years of 365 days each, or as short as two (2) years and one (1) day.

4.3.6 In the case of multiple party, multiple year projects, the "three (3) year" multiple year investment period begins on the date which any portion or item of property purchased or leased for business expansion is first placed in service or use by a project participant, and ends with the end of the second tax year subsequent to the end of the first tax year of that same participant during which such property is first placed in service or use.

4.3.7 In the case of multiple party, multiple year certified projects where two (2) or more project participants first place project property purchased or leased for business expansion into service or use simultaneously or on the same date, the multiple year project investment period begins on such date, and ends with the end of the second tax year subsequent to end of the first tax year when property purchased or leased for business expansion is first placed in service or use which occurs earliest in time among the those same particular project participants which have first placed investment into service or use on the same date.

§ 110-13C-4a. Credit allowed for locating corporate headquarters in this State.

4a.1 Credit allowed. - A corporation that presently has its corporate headquarters located outside of West Virginia that relocates its corporate headquarters in this State and employs, on a full-time basis, at its new corporate headquarters location, at least fifteen (15) people, who are domiciled in this State, shall be allowed credit under West Virginia Code article 11-13C.

4a.1.1 West Virginia Code § 11-13C-3(b)(13), in defining the term "new employees" for the purpose of determining the number of new jobs attributable to qualified investment, states, in relevant part, that:

> In no case shall the new employees allowed for purposes of this credit exceed the total increase in the taxpayer's employment in this state.

Thus, the allowable amount of credit must always be based upon the net number of new jobs created. Any decrease in the number of West Virginia employees in any area or segment of a taxpayer's business must count directly against the number of new jobs attributable to qualified investment over the (generally) ten (10) year credit period.

4a.2 Determination of credit. - The amount of credit allowed by West Virginia Code § 11-13C-4a and subsection 4a.1 of these regulations shall be determined, at the election of the taxpayer:

4a.2.1 By multiplying its adjusted qualified investment by its new jobs percentage (as determined under West Virginia Code § 11-13C-7); or

4a.2.2 By multiplying its adjusted qualified investment by ten percent (10%).

4a.3 Application of credit. - The corporate headquarters relocation credit allowed by West Virginia Code § 11-13C-41 and section 4a of these regulations shall be applied in the manner prescribed in West Virginia Code § 11-13C-5 and section 5 of these regulations: Provided, That the amount of corporation net income taxes against which the credit allowed by West Virginia Code § 11-13C-4a may be applied, shall be the sum of the corporation net income tax due on adjusted federal taxable income allocated to this State under West Virginia Code § 11-24-7, plus that portion of the corporation net income tax due on adjusted federal taxable income apportioned to this State under West Virginia Code § 11-24-7, that is further apportioned to the qualified investment using the payroll factor provided in paragraph (1), subsection (h) of West Virginia Code § 11-13C-5. For all other purposes, the credit allowed by this section shall be treated as credit allowed by West Virginia Code § 11-13C-4.

4a.4 Definition. - For purposes of this section.

4a.4.1 Adjusted qualified investment. - The term "adjusted qualified investment" means the taxpayer's qualified investment, as determined under West Virginia Code § 11-13C-6 and these regulations, plus the cost of the reasonable and necessary expenses it incurred to relocate its corporate headquarters at a location in this State from its present location outside this State.

4a.4.2 Corporate headquarters. - The term "corporate headquarters" means the place at which the corporation has its commercial domicile and from which the business of the corporation is primarily conducted.

4a.4.2.1 The term "commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed. A corporation need not become a domestic West Virginia corporation in order to have its commercial domicile in West Virginia for purposes of this credit.

4a.4.3 Reasonable and necessary expenses incurred to relocate corporate headquarters. - The phrase "reasonable and necessary expenses incurred to relocate corporate headquarters" means only those expenses incurred and paid by the corporation, to unrelated third parties, to move its corporate headquarters and its corporate headquarters employees to this State that are, upon application by the corporation, determined by the Tax Commissioner to have been both reasonable and necessary to effectuate the move. For periods subsequent to March 10, 1990, such expenses may include relocation allowances or reimbursements paid to relocated employees who own not more than one percent (1%) of the total equity of the corporation or any affiliate thereof. For purposes of this regulation, any person owning more than one percent (1%) of the total equity of the corporation or any affiliate of the corporation shall be deemed a related party, and payment to such persons shall not qualify as a reasonable and necessary expense.

4a.5 Effective date. - The credit allowed by West Virginia Code § 11-13C-4a shall be allowable for corporate headquarters placed in service or use on or after February 1, 1986.

§ 110-13C-4b. Credit allowable for certified projects. - West Virginia Code § 11-13C-4b provides for the creation of multiple party and multiple year business investment and jobs expansion tax credit projects. A multiple party business investment and jobs expansion tax credit project is one where two (2 or more business entities engage in a business enterprise to which the project participants contribute property or jobs or both. A multiple year project is one where the qualified investment is placed in service or use over a period of

more than one (1) year, up to three (3) tax years. It is possible to have a project which is both a multiple party project and a multiple year project.

4b.1 <u>In general</u>. - A project certified by the Tax Commissioner shall be eligible for the credit allowable by West Virginia Code article 11-13C. A project eligible for certification under W. Va. Code § 11-13C-4b is one where:

4b.1.1 The qualified investment under West Virginia Code article 11-13C creates at least fifty (50) new jobs but such qualified investment is placed in service or use over a period of three (3) successive tax years: <u>Provided</u>, That such qualified investment is made pursuant to a written business facility development plan of the taxpayer providing for an integrated project for investment at one or more new or expanded business facilities, a copy of which must be attached to the taxpayer's application for project certification and approved by the Tax Commissioner, and the qualified investment placed in service or use during the first year would not have been made without the expectation of making the qualified investment placed in service or use during the next two (2) succeeding tax years;

4b.1.1.1 Business investment and jobs expansion tax credit allowable for qualified investment in a multi-year project (or a multi-year, multiparticipant project) placed in service or use after March 9,1990 may not be used to offset severance tax, as provided in W. Va. Code § 11-13C-5(e), unless one of the transition rules set forth in W. Va. Code § 11-13C-14(c)(s)(B) or (C) applies.

4b.1.1.2 the term "project" as used in W. Va. Code § 11-13C-14(c)(B)(ii) and (iv) means and is limited to a multi-year project (or a multi-year, multiple participant project) in which qualified investment property is placed in service over a period of two or three successive tax years; and which is certified by the Tax Commissioner as a multi-year project (or as a multi-year, multiple participant project) under W. Va. Code § 11-13C-4b(b).

4b.1.1.3 The term "plan for an integrated project" as used in W. Va. Code § 11-13C-14(c)(2)(C)(ii) includes no more than two section 11-13C-14b(a) multi-year (or multi-year, multiple participant projects) each of which is certified by the Tax Commissioner under W. Va. Code § 11-13C-4b(b), if the integrated project plan satisfies the requirements set froth in section 14.3.2.3 of these regulations.

4b.2 <u>Application for certification</u>. - The application for certification of a project under West Virginia Code § 11-13C-4b shall be filed with and approved by the Tax Commissioner prior to any credit being claimed or allowed for the project's qualified investment and new jobs created as a direct result of the qualified investment. This application shall be approved in writing by all the participants in the project and shall contain such information as the Tax Commissioner may require to determine whether the project should be certified as eligible for credit under West Virginia Code § 11-13C-4b.

4b.2.1 Projects may be certified under West Virginia Code § 11-13C-4b subsequent to the placement of project investment into service or use and prior to the taking of project credit on tax returns. If project credit is taken on any tax return prior to project certification the taxpayer filing such returns shall be subject to audit and assessment of tax not paid due to offset by such credit and shall be liable for payment of tax, penalties, interest and additions to tax, notwithstanding the fact that project certification may be subsequently issued. Only when project certification is ultimately issued shall the taxpayer be entitled to credit. However, any penalties, interest and additions to tax due on tax not paid as a result of the premature application of the credit shall not be discharged by reason of the issuance of such certification. The taxpayer, upon receiving certification, may file amended tax returns <u>only</u> for open tax periods within the (generally) ten (10) year credit period not foreclosed by the limitations period set forth in West Virginia Code, chapter 11, article 10, and may take the credit against tax on such amended

returns. The filing of such amended returns shall not result in the discharge of interest, penalties or additions to tax due as a result of the premature taking of credit by the taxpayer. Credit which would have been available had timely certification been sought and issue for any tax year of the (generally) ten (10) year credit period which is foreclosed by the limitations period set forth in West Virginia Code, chapter 11, article 10 shall be forfeited.

4b.3 Taking of credit.

4b.3.1 If the certified project for which qualified investment is made involves one (1) or more persons making the capital investment and one (1) or more persons, or a combination thereof, creating at least fifty (50) new jobs at the site of the new or expanded business facility or facilities, then credit shall be allowed for the certified project based upon the qualified investment in the certified project (as determined under West Virginia Code § 11-13C-6 and these regulations) multiplied by the project's new-jobs percentage (determined under West Virginia Code § 11-13C-7 and these regulations).

4b.3.2 If the certified project for which qualified investment is made involves one or more persons making the capital investment and one (1) or more persons, or a combination thereof, creating at least fifty (50) new jobs located within a fifty (50) mile radius of each new or expanded business facility in which the qualified investment is made, then credit shall be allowed under this article for the certified project based upon the qualified investment in the certified project (as determined under West Virginia Code § 11-13C-6) multiplied by fifty percent (50%).

4b.3.2.1 West Virginia Code § 11-13C-4b(a)(3) permits the certification of a business investment and jobs expansion tax credit project creating at least fifty (50) new jobs located within a fifty (50) mile radius of each new or expanded business facility. This section addresses the very limited situation where investment is made in a business facility, and jobs having no permanent and fixed situs are created by that investment. The section does not apply to a situation where investment is made and jobs are created at two (2) or more facilities. It does not require that facilities be located within fifty (50) miles of each other. It merely requires that jobs be created within fifty (50) miles of any facility.

The fact that two (2) or more facilities in which qualified investment is made are more than fifty (50) miles apart will be irrelevant in determining whether or not the business investment and jobs expansion tax credit will apply. For purposes of the credit, investment in two (2) or more facilities would be treated in the same way as investment in one (1) business facility if the business engaged in appears to be a single unified enterprise, and the number of jobs created at or within fifty (50) miles of each facility would count toward the determination of the amount of business investment and jobs expansion tax credit available to the taxpayer.

4b.3.3 The amount of credit allowable, as determined under subdivision 4b.3.1 or 4b.3.2, above, shall be applied as provided in West Virginia Code § 11-13C-5, and shall be claimed in the manner specified in the project's application to the Tax Commissioner for certification under this section, by one (1) participant in the project or divided among the several participants in the project, and for this purpose the numerator of the payroll factor shall be the total compensation paid in this State during the taxable year by all project participants to all new employees filling the new jobs created and the denominator shall be the total compensation paid in this State, during the taxable year by all project participants to their employees. Such allocation, if approved by the Tax Commissioner, shall constitute a binding election by the participants in the project for the entire term during which the credit attributable to the qualified investment in the certified project may be applied to reduce tax liabilities.

4b.3.3.1 the three (3) tax year project investment period will

begin with the first tax year during which project investment is first placed into service or use. IT will end with the end of the second fiscal or calendar tax year subsequent to the end of the first tax year during which project investment was placed into service or use. See Section 4.3 of these regulations for determination of the time over which investment may be placed in service or use.

4b.3.3.1.a Investment placed in service or use over successive years, up to the three (3) tax year maximum for multiple year projects, may typically be added to the credit base when placed in service or use. However, disregarding any rebate credit carryover, the number of years over which the credit can be taken is ten (10) years, beginning in each year when the investment is placed in service or use. Thus, for example, disregarding a possible election to delay the beginning of the credit period for one (1) year, investment placed in service or use in year one (1) would create credit to be applied from year one (1) to year ten (10), and investment placed in service or use in year two (2) would create credit to be used from year (2) to year eleven (11), etc. The multiple year investment does not create a revised credit; rather, it adds new credit and new credit years to the credit already in place, and each discrete credit layer is applied over a ten (10) year period.

4b.3.3.1.b A taxpayer having multiple year project credit available may, pursuant to West Virginia Code § 11-13C-4 and section 4.2 of these regulations, elect to delay the beginning of the (typically) ten (10) year period over which credit may be taken by one (1) year for any or all of the three (3) tax years during which project investment may be placed in service or use. Thus, for example, credit arising from year one (1) investment may be taken beginning in either year one (1) or two (2). Credit arising from year two (2) investment may be taken beginning in year two (2) or year three (3), and credit arising from year three (3) investment may be taken beginning in year three (3) or year four (4). This will permit the taxpayer to aggregate any two (2) successive year's credit for purposes of determining the beginning of the (typically) ten (10) year period for taking the credit against taxes. Credit for investment placed in service or use in years one (1) and two (2) can thus be taken beginning in year two (2) or credit for years two (2) and three (3) can be taken beginning in year three (3).

4b.3.3.2 The participant or participants claiming the credit for qualified investments in a certified project shall annually file with their income tax returns filed under this chapter:

4b.3.3.2.a Certification that the participant's qualified investment property continues to be used in the project and if disposed of during the tax year, was not disposed of prior to expiration of its useful life;

4b.3.3.2.b certification that the new jobs created by the project's qualified investment continue to exist and are filled by persons who are residents of this State; and

4b.3.3.2.c such other information as the Tax Commissioner requires to determine continuing eligibility to claim the annual credit allowance for the project's qualified investment.

4b.3.4 <u>Payroll factor</u>. - For multiple party projects or multiple year, multiple party projects where all project participants have only credit arising from one project available to them, the payroll factor apportionment fraction described in West Virginia Code § 11-13C-4b(c)(3) should be used by project participants in determining the amount of tax against which the project business investment and jobs expansion tax credit may apply.

4b.3.4.1 The statutory scheme set forth in West Virginia Code § 11-13C-5 for determining the amount of a given tax against which the business

investment and jobs expansion tax credit can apply is to set up a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in West Virginia holding positions directly attributable to qualified investment, and the denominator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in West Virginia. This fraction is then used as a multiplier for determining the portion of each business tax due (which is solely attributed to and the direct result of the taxpayer's qualified investment) against which the business investment and jobs expansion tax credit can be taken.

West Virginia Code § 11-13C-5 uses the term "all employees of the taxpayer employed in this state" for determining both the numerator and denominator of the multiplier fraction. This term must be interpreted to mean all employees employed in West Virginia without regard to domicile or residence. To interpret the term otherwise might encourage taxpayers to hire non-West Virginia domiciliaries or nonresidents for jobs not attributable to qualified investment. If only West Virginia domiciled residents were counted in the numerator and denominator, the hiring of non-West Virginians for all jobs except those attributable to qualified investment would decrease the denominator and would result in an increase in the amount of tax against which the credit would be available.

For example: If only jobs held by West Virginia domiciliaries or residents were counted in determining the numerator and denominator of the multiplier fraction, and if the taxpayer had one thousand (1,000) numerator category jobs and four thousand five hundred (4,500) denominator category jobs, the taxpayer could increase the multiplier by firing three thousand five hundred (3,500) West Virginians in jobs not related to the investment and hiring three thousand five hundred (3,500) out-of-state domiciliaries to replace the West Virginia domiciled or resident employees. The multiplier would then go from one thousand/four thousand five hundred (1,000/4,500), or twenty-two percent (22%) to one thousand/one thousand (1,000/1,000), or one hundred percent (100%), despite the loss of three thousand five hundred (3,500) jobs formerly held by West Virginia citizens.

The policy of recognizing only jobs held by West Virginia domiciled West Virginia residents in the numerator and denominator would thus have an effect contrary to the purpose of the business investment and jobs expansion tax credit. It would encourage employment of non-West Virginia employees in denominator category jobs not attributable to qualified investment. Since the number of denominator category jobs not attributable to qualified investment is often greater than numerator category jobs, the effect would be to discourage the hiring of West Virginia domiciliaries or residents.

4b.3.4.2 West Virginia Code § 11-13C-4b(c)(3) (for multiple party projects) requires that the numerator of the payroll factor be the total compensation paid in the State of West Virginia during the taxable year by all project participants to all "new employees" filling the "new jobs" created, and the denominator be the total compensation paid in West Virginia during the taxable year by all project participants to their employees.

The term "new job" is defined in West Virginia Code § 11-13C-4b(d)(1) as a job which did not exist in West Virginia prior to the qualified investment being made, and which is filled by a new employee. The term "new employee" is defined in West Virginia Code § 11-13C-4b(d)(1) as a person residing and domiciled in West Virginia, hired by a participant to fill a position for a job in West Virginia which did not exist in West Virginia prior to the date on which the qualified investment is placed in service or use in West Virginia.

4b.3.4.3 West Virginia Code § 11-13C-5 prescribes the numerator and the denominator for the payroll factor based upon payroll of "all employees of the taxpayer employed in this state," and this term encompasses jobs held by West Virginia domiciliaries and residents as well as employees employed in West

Virginia who are not West Virginia domiciliaries or residents. However, the payroll factor for multiple party projects is more limited. Unlike the payroll factor specified under West Virginia Code § 11-13C-5, the payroll factor for business investment and jobs expansion tax credit projects, where all participants in a multiple party project have such credit available to them from one or more multiple party or multiple year, multiple party projects, must have a numerator based upon payroll of all "new employees" of all participants filling "new jobs." Because the term "new employee" is defined to include only West Virginia domiciled, West Virginia residents, only payroll of West Virginia domiciled West Virginia residents, including (unlike other payroll factor determinations under West Virginia Code § 11-13C-5) payroll attributable to part-time employees, will be included in the numerator.

4b.3.4.3.a West Virginia Code § 11-13C-7(e) reads as follows:

> Equivalency of permanent employees. - The hours of part-time employees shall be aggregated to determine the number of equivalent full-time employees for the purpose of subsection (b) hereof but not for the purposes of subsection (c) hereof.

This provision excludes part-time employees from qualifying as employees holding jobs "directly attributable to the qualified investment" under West Virginia Code § 11-13C-7(c).

West Virginia Code § 11-13C-4b(d) and West Virginia Code § 11-13C-3(b)(13) define a part-time basis job as one being performed at least twenty (20) hours per week for at least six (6) months during the taxable year. For temporary or seasonal jobs, unlike part-time jobs, as defined above, the hours cannot be aggregated to determine equivalent full-time employees. Indeed, temporary or seasonal employees are specifically excluded from the definition of "permanent employees" as defined in West Virginia Code §§ 11-13C-4b(d) and 11-13C-3(b)(13), and payroll of seasonal and temporary employees cannot be included in the apportionment fraction numerator for multiple party project participants or any other project or nonproject credit taker.

The denominator of the factor will be based upon payroll of all employees employed in West Virginia without regard to domicile or residence.

4b.3.4.4 The payroll factor under both West Virginia Code § 11-13C-5 (for credit takers generally) and West Virginia Code § 11-13C-4b(c)(3) (for multiple party projects) should be calculated for each year of the ten (10) year (or sometimes longer) credit period and neither the numerator nor the denominator should be limited by the number of jobs created during the three (3) year new jobs redetermination period set forth in West Virginia Code § 11-13C-6.

4b.3.4.5 The payroll factor for nonproject business investment and jobs expansion tax credit takers, multiple year, non-multiple party project tax credit takers and taxpayers involved in multiple party projects or multiple year, multiple party projects where one or more project participants is entitled to a nonproject business investment and jobs expansion tax credit or a multiple year nonmultiple party project credit in addition to and separate from the multiple party or multiple year, multiple party project credit, the numerator of the payroll factor should be based upon "employees of the taxpayer employed in this state whose positions are directly attributable to the qualified investment, without regard to residence or domicile; rather than upon only West Virginia domiciled West Virginia residents holding "new jobs." The denominator of the factor will be based upon payroll of all employees employed in West Virginia without regard to domicile or residence.

4b.3.4.6 This subsection prescribes a mathematical procedure to be used in business investment and jobs expansion tax credit computations for determining the West Virginia Code § 11-13C-4b(c)(3) and West Virginia Code

§§ 11-13C-5(c)(2), (d)(2), (e)(2), (f)(2), (g)(2), (h)(2) and (i)(3) payroll based tax liability apportionment fraction for multiple project project participants or multiple business investment and jobs expansion tax credit taxpayers and entities participating in projects where one or more participants are multiple project project participants or multiple business investment and jobs expansion tax credit taxpayers.

4b.3.4.6.a Certain taxpayers have implemented more than one investment program subject to business investment and jobs expansion tax credit or are participants in more than one business investment and jobs expansion tax credit project.

This presents a problem in calculating what the tax liability apportionment fraction should be. The business investment and jobs expansion tax credit statute requires that a taxpayer determine what portion of its tax liability is attributable to qualified investment, and therefore subject to the business investment and jobs expansion tax credit, by multiplying the total tax liability for each tax against which the credit can be taken, except for sales tax and the payroll and property taxes, by a fraction consisting of payroll attributable to qualified investment over total West Virginia payroll. For project participants, the statute requires that the fraction be total payroll of all project participants attributable to new investment over total West Virginia payroll of all participants.

The statutory formulas are adequate in the situation where taxpayers have only one nonproject business investment and jobs expansion tax credit available to them or where all participants in a project have only that project business investment and jobs expansion tax credit available to them. However, when the taxpayer has more than one nonproject or project business investment and jobs expansion tax credit available, there is no statutory prescription as to how the payroll fraction is to be computed, and the computation and simple addition of two or more statutory fractions may result in a fraction which is more than one hundred percent (100%). It was not the intention of the Legislature to allow taxpayers to take the business investment and jobs expansion tax credit against more than one hundred percent (100%) of business taxes in any given year. In the case of a project where one project participant is a participant in other projects, or has a nonproject business investment and jobs expansion tax credit available in addition to the project business investment and jobs expansion tax credit, use of such a computation could result in a decrease of the fraction used by the other project participants and could unfairly deprive them of credit to which they should be entitled.

4b.3.4.6.b For taxpayers which are multiple project participants, or which have any combination of multiple project and nonproject business investment and jobs expansion tax credits available, the numerator of the payroll fraction should be all payroll attributable to qualified investment of all participants in all projects in which the taxpayer is a participant, plus any payroll attributable to qualified investment for any nonproject business investment and jobs expansion tax credit available to the taxpayer. It should not include any payroll attributable to nonproject business investment and jobs expansion tax credit qualified investment for other project participants, and it should not include any payroll attributable to project business investment and jobs expansion tax credit qualified investment for other project participants in projects other than the projects in which the taxpayer is a project participant.

4b.3.4.6.b.1 The denominator should be total payroll of all West Virginia jobs, without regard to domicile on residence of job holders, of all participants in all projects in which the taxpayer is a participant. It should not include West Virginia payroll of other participants attributable to nonproject business investment and jobs expansion tax credit qualified investment, and it should not include any payroll attributable to project business investment and jobs expansion tax credit qualified investment for other project participants in projects other than the projects in which the taxpayer is a project participant.

4b.3.4.6.c For taxpayers who are participants in only one project where one or more of the other participants in that project is also a participant in one or more other projects or has business investment and jobs expansion tax credit available from one or more other project or nonproject business investment and jobs expansion tax credit investments:

4b.3.4.6.c.1 The numerator should be all payroll attributable to qualified investment of all project participants in the particular project in which the taxpayer is involved plus payroll attributable to any nonproject business investment and jobs expansion tax credit investment available to the taxpayer. It should not include payroll attributable to any nonproject business investment and jobs expansion tax credit investment of any project participants other than the taxpayer or attributable to project business investment and jobs expansion tax credit qualified investment, other than investment in the project in which the taxpayer is a participant, of any project participants other than the taxpayer.

4b.3.4.6.c.2 The denominator should be all West Virginia payroll without regard to domicile on residence of job holders of all participants in the particular project in which the taxpayer is a participant, less the West Virginia payroll of participants in that project, other than the taxpayer, attributable to nonproject business investment and jobs expansion tax credit qualified investment, and less West Virginia payroll of participants other than the taxpayer attributable to project business investment and jobs expansion tax credit qualified investment other than qualified investment in the project in which the taxpayer is a participant.

4b.3.4.6.d Numerator of the fraction.

4b.3.4.6.d.1 In accordance with Section 4b.3.4.5 of these regulations, "payroll attributable to qualified investment" for purposes of calculating the payroll factor numerator for a "purely" multiple party project taxpayer which is a participant in a multiple party or multiple year, multiple party project and where neither the taxpayer nor any other participant in the project in which the taxpayer is a participant is entitled to a nonproject credit or a multiple year non-multiple party project credit, the "payroll attributable to qualified investment" for the numerator of the payroll factor should be based upon West Virginia domiciled, West Virginia residents holding "new jobs" directly attributable to qualified investment and should include payroll of part-time West Virginia domiciled, West Virginia resident employees who meet the statutory definition of part-time employees.

4b.3.4.6.d.2 In accordance with section 4b.3.4.5 of these regulations, "payroll attributable to qualified investment" for purposes of calculating the payroll factor numerator for a taxpayer which has more than one nonproject business investment and jobs expansion tax credit available or more than one (1) multiple year nonmultiple party project credits available or which is a participant in a multiple party or multiple year, multiple party project, where the taxpayer or any other project participant in the same project in which the taxpayer is a participant has one or more nonproject credits or multiple year, nonmultiple party project credits, the "payroll attributable to qualified investment" for the numerator of the payroll factor should be based upon all full-time employees (excluding part-time employees) holding jobs directly attributable to qualified investment without regard to residency or domicile and not upon "new jobs."

4b.4 Terms defined. - For purposes of this section:

4b.4.1 New employee. - The term "new employee" means a person residing and domiciled in this State, hired by a participant to fill a position for a job which previously did not exist in this State prior to the date on which the project's qualified investment is placed in service or use in this State. In no case shall the new employees allowed for purposes of this credit exceed the total increases in the number of persons employed by the project's

participants (considered as a group) in this State. A person shall be deemed to be a "new employee" if such person's duties in connection with the operation of the certified project are on:

4b.4.1.1 A regular, full-time and permanent basis.

4b.4.1.1.a For projects for which the application for certification was filed prior to March 10, 1990, "full-time employment" means employment for at least one hundred twenty (120) hours per month at a wage not less than the prevailing state or federal minimum wage, depending on which minimum wage provision is applicable to the business.

4b.4.1.1.b For projects for which the application for certification was filed after March 9, 1990, "full-time employment" means employment for at least one hundred forty (140) hours per month at a wage not less than the prevailing state or federal minimum wage, depending on which minimum wage provision is applicable to the business.

4b.4.1.1.c "Permanent employment" does not include employment that is temporary or seasonal.

4b.4.1.2 A part-time basis, provided such person is customarily performing such duties at least twenty (20) hours per week for at least six (6) months during the taxable year.

4b.4.2 Participant. - The term "participant" means any person who directly makes a qualified investment in a certified project, or who employs persons filling the jobs certified by the Tax Commissioner as being new jobs created as a direct result of the project's qualified investment.

4b.5 Effective date.

4b.5.1 West Virginia Code § 11-13C-4b shall apply to a project having qualified investment of at least fifty (50) million dollars placed in service or use between March 1, 1985 and February 1, 1986, and shall also apply to qualified investment made on or after February 1, 1986.

4b.5.2 Special requirements for fifty million dollar ($50,000,000) projects placed in service or use between March 1, 1985 and February 1, 1986.

4b.5.2.1 The application for project certification for a project having qualified investment of at least fifty million dollars ($50,000,000) placed in service or use between March 1, 1985 and February 1, 1986, shall be deemed timely filed under West Virginia Code § 11-13C-4b only if such application is filed with the Tax Commissioner prior to December 31, 1986: Provided, That the Tax Commissioner shall not certify such project until the project participants certify that at least fifty (50) new jobs were created by them prior to January 1, 1988, as a direct result of their qualified investment in the project, and that such jobs did not previously exist in this State, determined as of January 31, 1986; that the inclusion of such property shall not give rise to a refund or credit of any taxes administered under chapter 11 of the West Virginia Code for taxable years ending before January 1, 1987, and that the ten (10) year credit period for such certified project shall begin with the current taxable year of the project participant or participants who will be claiming the allowable credit.

4b.4.2.2 West Virginia Code § 11-13C-4b(e)(1) reads as follows:

> This section shall apply to a project having qualified investment of at least fifty million dollars placed in service or use between the first day of March, one thousand nine hundred eighty-five and the first day of February, one thousand nine hundred eighty-six, and shall also apply to qualified investment made on or after the first day of

February, one thousand nine hundred eighty-six.

This language cannot be interpreted as allowing totally unrestricted availability of the business investment and jobs expansion tax credit for future investment without regard to how far into the future that investment might occur after the initial investment which created the new jobs required for qualification under the section. Such an interpretation would be inconsistent with the legislative purpose underlying the Business Investment and Jobs Expansion Tax Credit Act.

West Virginia Code § 11-13C-4b(a)(1) sets forth the maximum time period to be found under the provisions of the business investment and jobs expansion tax credit statute over which investment may be placed in service or use in a business investment and jobs expansion tax credit project. This maximum time period is three (3) years.

West Virginia Code § 11-13C-4b(e)(1) expressly mandates that the section shall apply to investment placed in service or use between March 1, 1985 and February 1, 1986, and after February 1, 1986. West Virginia Code § 11-13C-4b(a)(1) sets forth the maximum time period provided in the statute for placing investment in service or use. These subsections can be read in pari materia to limit the time over which investment qualified for credit under West Virginia Code § 11-13C-4b(e)(1) can be placed in service or use after February 1, 1986 to include only that investment placed in service or use after February 1, 1986 through the end of the second taxable year subsequent to the end of the tax year during which February 1, 1986 occurred.

Thus, the three (3) year maximum time limitation set forth in West Virginia Code § 11-13C-4b(a)(1) would apply to investment made subsequent to February 1, 1986 for West Virginia Code § 11-13C-4b(e)(1) fifty million dollar ($50,000,000) projects in service or use between March 1, 1985 and February 1, 1986.

4b.6 Project participants.

4b.6.1 The business investment and jobs expansion tax credit is not adversely affected if a project participant is dropped and a substitute participant or the remaining participants take the place of the dropped participant so that the number of jobs and investment property in service or use remains substantially unchanged. If a participant is dropped or a substitute participant is added, the project participants must file an amendment to the application for project certification and written business facility development plan reflecting the change, and must obtain approval of the amendment from the Tax Commissioner.

4b.6.2 Ordinarily where a new project participant is to be added or a new project participant is to be substituted for a former project participant, the Tax Commissioner will require the project participants to obtain approval from the Tax Commissioner for such a substitution and to amend the application for project certification prior to the addition or substitution of the new project participant. Failure to submit an amendment for participant addition or substitution prior to such addition or substitution shall result in an invalid and unrecognized addition or substitution until such amendment is submitted to the Tax Commissioner and approved by the Tax Commissioner.

If project credit is taken on any tax return prior to such approval, based in whole or in part upon the participation of a new or substitute proposed project participant not yet approved by the Tax Commissioner, the taxpayer filing such returns shall be subject to the same treatment specified under section 4b.2.1 of these regulations as a taxpayer who takes project credit for a proposed certified project prior to, or in the absence of, the issuance of project certification under W. Va. Code § 11-13C-4b.

4b.6.3 For a single year, multiple party project, an added project participant whose investment is place in service or use in the one (1) year

project investment period and whose new jobs are in place within the three (3) year new jobs redetermination period set forth in West Virginia Code § 11-13C-7(f) will have such investment and jobs counted toward the determination of the amount of the project credit. Any investment placed in service or use or jobs created by a project participant after the relevant one (1) year project investment period or three (3) year new jobs redetermination period have expired would not count toward the credit.

4b.6.3.1 New project participants may not be added to a single year, multiple party project subsequent to expiration of the three hundred sixty-five (365) day project investment period. Although other entities could engage in the project enterprise after the above described three hundred sixty-five (365) day investment period has expired, such entities could not be added as new project participants. However, substitute project participants acting as successors to already participating participants could be substituted subsequent to the end of the above-described three hundred sixty-five (365) day period so long as the total number of jobs is substantially unchanged and qualified investment property in service or use is substantially unchanged.

4b.6.4 For a multiple year, multiple party project, an added project participant whose investment is placed in service or use in the three-year multiple year project investment period set forth in West Virginia Code § 11-13C-4b(a)(1), and whose new jobs are in place in the final year of the three (3) year new jobs redetermination period set forth in West Virginia Code § 11-13C-7(f), will have such investment and jobs counted toward the determination of the amount of the project credit. Any investment placed in service or use or jobs created by a project participant after the relevant three (3) year periods have expired would not county toward the credit. These periods are coterminous in the case of multiple year or multiple party, multiple year projects.

4b.6.4.1 New project participants may not be added, except as successors to ongoing participants, after expiration of the three (3) year new jobs redetermination period or the three (3) year project investment period set forth in West Virginia Code § 11-13C-7(f) and West Virginia Code § 11-13C-4b(a)(1), respectively. These periods would typically end simultaneously with the end of the second tax year subsequent to the end of the tax year during which project investment was first placed in service or use. Refer to section 4.3 of these regulations for discussion of investment periods.

4b.6.4.2 Although other entities could engage in the project enterprise after the above-described three (3) year periods have expired, such entities could not be added as new project participants. However, substitute project participants acting as successors to already participating participants could be substituted subsequent to the end of the above-described three (3) year periods so long as the total number of jobs and qualified investment in service or use remained substantially unchanged.

4b.6.4.3 Addition or substitution of a project participant will require submission of an amendment to the application for project certification. Such amendment can consist of a letter identifying the new or substitute participants and describing the change sought. The letter should contain or be accompanied by a properly executed statement of participation from each new or substitute participant, and an agreement executed by the new or substitute participants to the plan of credit allocation among project participants in effect for the project.

4b.6.4.4 Addition or substitution of project participants must be approved by the Tax Commissioner prior to the addition or substitution.

4b.6.4.5 Nothing herein shall be construed to preclude the transfer or sale of qualified investment to a successor in business as set forth in West Virginia Code § 11-13C-9 at any time during the life of the credit. The employees of a successor will be considered new employees to the extent they

replace or succeed jobs held by employees filling new jobs of the business transferred, provided that such replacement or successor employees are West Virginia domiciled, West Virginia residents and otherwise fulfill the requirements, as appropriate, of new employees filling new jobs in accordance with Article 13C, Chapter 11 of the West Virginia Code.

4b.7 <u>Information disclosure</u>. - A taxpayer which is a project participant in a duly certified multiple party project under West Virginia Code § 11-13C-4b shall be considered an interested party under West Virginia Code § 11-13C-5d(f) with relation to all other taxpayers shown by Department of Tax and Revenue records or certification letters, applications for project certification, rulings of the Department, requests for rulings, or background file documents relating to the business investment and jobs expansion tax credit to be participants in the same certified project as such taxpayer. All communications between the Department of Tax and Revenue and any participant in the same project as the taxpayer relating to the credit, except for tax returns, audits, assessments and communications not deemed appropriate for disclosure by the Tax Commissioner or not subject to disclosure by the Tax Commissioner, shall be disclosable to such taxpayer under West Virginia Code § 11-10-5d(f). The Tax Commissioner shall have absolute discretion to grant or refuse disclosure of information under this section.

§ 110-13C-5. <u>Application of annual credit allowance</u>.

5.1 <u>In general</u>. - The aggregate annual credit allowance for the current taxable year is an amount equal to the sum of:

5.1.1 The one-tenth part allowed under West Virginia Code § 11-13C-4 for qualified investment placed into service or use during a prior taxable year, plus

5.1.2 The one-tenth part allowed under West Virginia Code § 11-13C-4 for qualified investment placed into service or use during the current taxable year, plus

5.1.3 The one-tenth part allowed under West Virginia Code § 11-13C-4a for locating corporate headquarters in this State; or the amount allowed under West Virginia Code § 11-13C-7a for the taxable year.

5.2 <u>Application of current year annual credit allowance</u>. - The amount determined under section 5.1 shall be allowed as a credit against that portion of the taxpayer's State tax liability which is attributable to and the direct result of the taxpayer's qualified investment, and shall be applied as provided in West Virginia Code § 11-13C-5(c) through (k), both inclusive, and in sections 5.3 through 5.11, both inclusive, of these regulations and the subsections thereof.

5.3 <u>Business and occupation taxes</u>.

5.3.1 that portion of the allowable credit attributable to qualified investment in a business or other activity subject to the taxes imposed by West Virginia Code article 11-13 shall first be applied to reduce up to eighty percent (80%) of the taxes imposed by West Virginia Code article 11-13 for the taxable year (determined before application of allowable credits against tax and the annual exemption).

5.3.2 If the taxes due under said article thirteen are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under West Virginia Code article 11-13 the amount of such taxes, which are so attributable, shall be determined by multiplying the amount of taxes due under said article thirteen, for the taxable year (determined before application of any allowable credits against tax and the annual exemption), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the

taxpayer employed in this State, whose positions are directly attributable to the qualified investment in a business or other activity taxable under article thirteen of this chapter. The denominator of the fraction shall be the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer, employed in this State, whose positions are directly attributable to the business or other activity of the taxpayer, that is taxable under the said article thirteen.

5.3.3 The annual exemption allowed by section three of said article thirteen, plus any credits allowable under West Virginia Code articles 11-13-d and 11-13-e of shall be applied against and reduce only the portion of article thirteen taxes not apportioned to the qualified investment under West Virginia Code article 11-13C: Provided, That any excess exemption or credits may be applied against the amount of article thirteen taxes apportioned to the qualified investment under West Virginia Code article 11-13C, that is not offset by the amount of annual credit against such taxes allowed under West Virginia Code article 11-13C for the taxable year, unless their application is otherwise prohibited by West Virginia Code chapter 11.

5.4 Carrier income taxes.

5.4.1 That portion of the allowable credit attributable to qualified investment in a business or other activity subject to the taxes imposed by West Virginia Code article 11-12a, shall first be applied to reduce up to eighty percent of the taxes imposed by West Virginia Code article 11-12a, for the taxable year.

5.4.2 If the taxes due under said article twelve-a are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under said article twelve-a, the amount of such taxes, which are so attributable, shall be determined by multiplying the amount of taxes due under said article twelve-a, for the taxable year, by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this State, whose positions are directly attributable to the qualified investment in a business or other activity taxable under said article twelve-a. The denominator of the fraction shall be the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer, employed in this State, whose positions are directly attributable to the business or other activity of the taxpayer, that is taxable under said article twelve-a.

5.5 Severance taxes.

5.5.1 On and after July 1, 1987, for investment placed in service or use prior to March 10, 1990 or investment subject to the transition rules set forth in West Virginia Code § 11-13C-14(c)(2), that portion of the allowable credit attributable to qualified investment in a business or other activity subject to the tax imposed by West Virginia Code article 11-13a, and qualified investment in a business or activity that was subject to the tax imposed by said article thirteen of this chapter prior to said first day of July, but on and after said first day of July, is subject to the tax imposed by West Virginia Code article 13a, shall first be applied to reduce up to eighty percent (80%) of the taxes imposed by said article thirteen of this chapter prior to said July 1, but on and after said July 1, is subject to the tax imposed by West Virginia Code article 11-13a, shall first be applied to reduce up to eighty percent (80%) of the taxes imposed by said article thirteen-a for the taxable year (determined before application of any allowable credits against tax and the annual exemption credit.)

5.5.2 If the taxes due under said article thirteen-a are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under said article thirteen-a, the amount of such taxes, which are so attributable, shall be determined by multiplying the amount of taxes due under said article thirteen-a, for the

taxable year (determined before application of any allowable credits against tax), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this State, whose positions are directly attributable to the qualified investment in a business or other activity taxable under said article thirteen-a. The denominator of the fraction shall be the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer, employed in this State, whose positions are directly attributable to the business or other activity of the taxpayer, that is taxable under said article thirteen-a.

5.5.3 Any credits allowable under West Virginia Code articles 11-13D and 11-13E, shall be applied against and reduce only the portion of article thirteen-a taxes not apportioned to the qualified investment under West Virginia Code article 11-13C: Provided, That any excess credits may be applied against the amount of article thirteen taxes apportioned to the qualified investment under West Virginia Code article 11-13C, that is not offset by the amount of annual credit against such taxes allowed under West Virginia Code article 11-13C for the taxable year, unless their application is otherwise prohibited by West Virginia Code article 11-13C.

5.6 Telecommunications taxes.

5.6.1 On and after July 1, 1987, that portion of the allowable credit attributable to qualified investment in a business or other activity subject to the taxes imposed by West Virginia Code article 11-13B, shall first be applied to reduce up to eighty percent (80%) of the taxes imposed by West Virginia Code article 11-13B for the taxable year (determined before application of allowable credits against tax) and qualified investment in a business or activity that was subject to the taxes imposed by West Virginia Code article 11-12A prior to said July 1, but on and after said July 1, is subject to the tax imposed by West Virginia Code article 11-13B.

5.6.2 If the taxes due under said article thirteen-b are not solely attributable to and the direct result of the taxpayer's qualified investment in a business or other activity taxable under West Virginia Code article 11-13B, the amount of such taxes, which are so attributable, shall be determined by multiplying the amount of taxes due under said West Virginia Code article 11-13B, for the taxable year (determined before application of any allowable credits against tax), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this State, whose positions are directly attributable to the qualified investment in a business or other activity taxable under West Virginia Code article 11-13B. The denominator of the fraction shall be the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer, employed in this State, whose positions are directly attributable to the business or other activity of the taxpayer, that is taxable under West Virginia Code article 11-13B.

5.7 Business franchise tax.

5.7.1 On and after July 1, 1987, that portion of the allowable credit attributable to qualified investment in a business or activity subject to the taxes imposed by West Virginia Code article 11-23, and qualified investment in a business or activity that was subject to the taxes imposed by West Virginia Code article 11-13 prior to said July 1, but on and after said July 1, is subject to the tax imposed by West Virginia Code article 11-23, shall first be applied to reduce up to eighty percent (80%) of the taxes imposed by said article twenty-three for the taxable year (determined after application of the credits against tax provided in West Virginia Code § 11-23-17, but before application of any other allowable credits against tax).

5.7.2 If the taxes due under said article twenty-three are not solely attributable to and the direct result of the taxpayer's qualified

investment in a business or other activity taxable under article twenty-three, for the taxable year (determined after application of the credits against tax provided in section seventeen of said article twenty-three, but before application of any other allowable credits), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this State, whose positions are directly attributable to the qualified investment in a business or other activity taxable under West Virginia Code article 11-23. The denominator of the fraction shall be wages, salaries and other compensation paid during the taxable year to employees of the taxpayer, employed in this State, whose positions are directly attributable to the business or other activity of the taxpayer that is taxable under West Virginia Code article 11-23.

5.7.3 Any credits allowable under West Virginia Code articles 13D and 13E shall be applied against and reduce only the portion of article twenty-three taxes not apportioned to the qualified investment under West Virginia Code article 11-13C. Provided, That any excess exemption or credits may be applied against the amount of article twenty-three taxes apportioned to the qualified investment under West Virginia Code article 11-13C that is not offset by the amount of annual credit against such taxes allowed under West Virginia Code article 11-13C for the taxable year, unless their application is otherwise prohibited by West Virginia Code chapter 11.

5.8 Corporation net income taxes.

5.8.1 After application of West Virginia Code §§ 11-13C-5(c) through (g), both inclusive, and sections 5.3 through 5.7, both inclusive, of these regulations and the subsections thereof, any unused credit shall next be applied to reduce up to eighty percent (80%) of the taxes imposed by West Virginia Code article 11-24 for the taxable year (determined before application of allowable credits against tax).

5.8.2 If the taxes due under said article twenty-four (determined before application of allowable credits against tax) are not solely attributable to and the direct result of the taxpayer's qualified investment, the amount of such taxes which are so attributable, shall be determined by multiplying the amount of taxes due under said article twenty-four for the taxable year (determined before application of allowable credits against tax), by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer employed in this State, whose positions are directly attributable to the qualified investment. The denominator of the fraction shall be the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer, employed in this State.

5.8.3 Any credit allowable under West Virginia Code article 11-24 shall be applied against and reduce only the amount of article twenty-four taxes not apportioned to the qualified investment under West Virginia Code article 11-13C: Provided, That any excess credits may be applied against the amount of article twenty-four taxes apportioned to the qualified investment under West Virginia Code article 11-13C that is not offset by the amount of annual credit against such taxes allowed under West Virginia Code article 11-13C for the taxable year, unless their application is otherwise prohibited by West Virginia Code chapter 11.

5.9 Personal income taxes.

5.9.1 If the person making the qualified investment is an electing small business corporation (as defined in Section 1361 of the United States Internal Revenue Code of 1954, as amended), a partnership or a sole proprietorship, then any unused credit (after application of sections 5.3, 5.4, 5.5, 5.6 and 5.7 and the subsections thereof of these regulations shall be allowed as a credit against up to eighty percent of the taxes imposed by West Virginia Code article 11-21 on the income from business or other activity

subject to tax under West Virginia Code articles 11-12a, 11-13, 11-13a, 11-13b or 11-23.

5.9.2 Electing small business corporations, partnerships and other unincorporated organizations shall allocate the credit allowed by this article among its members in the same manner as profits and losses are allocated for the taxable year.

5.9.3 If the amount of taxes due under West virginia Code article 11-21 (determined before application of allowable credits against tax), that is attributable to business, is not solely attributable to and the direct result of the qualified investment of the electing small business corporation, partnership, other unincorporated organization or sole proprietorship, the amount of such taxes which are so attributable shall be determined by multiplying the amount of taxes due under said article twenty-one (determined before application of allowable credits against tax), that is attributable to business by a fraction, the numerator of which is all wages, salaries and other compensation paid during the taxable year to all employees of the electing small business corporation, partnership, other unincorporated organization or sole proprietorship employed in this State, whose positions are directly attributable to the qualified investment. The denominator of the fraction shall be the wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer.

5.9.4 No credit shall be allowed under this section against any employer withholding taxes imposed by said article twenty-one.

5.9.4.1 If the individual's personal income is solely attributable to a distribution of income from a qualified entity entitled to business investment and jobs expansion credit then the individual may either apply the credit against either eighty percent (80%) of his/her West Virginia personal income tax liability, if the income is solely attributable to and the direct result of the qualified investment, or eighty percent (80%) of his/her West Virginia personal income tax liability as apportioned under section 5.9.3 of these regulations, if the income is not solely attributable to and the direct result of the qualified investment.

5.9.4.2 If the individual's personal income is not solely attributable to a distribution of income from a qualified entity entitled to business investment and jobs expansion credit then the individual must determine the portion of his/her West Virginia adjusted gross income attributable to the qualified income distribution in addition to possibly apportioning his/her income distribution as required under section 5.9.3 of these regulations.

For example:

John received $1,000,000 in taxable income distributions from the MM Small Business Corporation, a business entitled to the business investment and jobs expansion credit. MM has a total West Virginia payroll of $12,000,000 but only $6,000,000 of payroll is directly attributable to the qualified investment. Therefore MM's payroll apportionment factor is 50% ($6,000,000/$12,000,000).

In addition to his $1,000,000 distribution from MM, John also received $100,000 in wage and salary income, $200,000 in capital gains, $50,000 in dividends and $250,000 from an oil and gas partnership. John's total West Virginia adjusted gross income is $1,600,000 ($1,000,000 + $100,000 + $200,000 + $50,000 + $250,000). John's pre-credit West Virginia personal income tax liability equals $102,745.

John determines the portion of his tax subject to business investment and jobs expansion tax credit offset by multiplying his pre-credit tax liability ($102,745) by both MM's payroll apportionment factor (50%) and by the fraction of his total West Virginia adjusted gross income directly attributable to the qualified income distribution from MM (62.5% or $1,000,000/$1,600,000). John

may then apply any unused credit (remaining after applications of sections 5.3, 5.4, 5.5, 5.6 and 5.7 and the subsections thereof of these regulations) against up to 80% ($25,686) of his personal income tax ($32,108) attributable to the qualified investment by MM Small Business Corporation.

5.10 Sales and use taxes.

On and after July 1, 1987, for purchases of tangible personal property and taxable services made on or after that date, that portion of the allowable credit, which is attributable to qualified investment in a business or activity subject to the taxes imposed by West virginia Code articles 11-15 and 11-15a on purchases for use or consumption in the conduct of such business or activity, shall be applied to reduce up to eighty percent (80%) of the taxes imposed by West Virginia Code article 11-15 and 11-15a on purchases that are directly used or consumed in the qualified investment activity. When property and services purchased for use or consumption are not solely used or consumed in the qualified investment activity, the cost thereof shall be apportioned between such activities. Only that amount apportioned to purchases directly used or consumed in the qualified investment activity shall be included when applying the credit allowable under this section.

5.10.1 West Virginia Code § 11-13C-5 sets forth the taxes, in order, against which the business investment and jobs expansion tax credit can be taken.

The sales tax and use tax are set out in the order of taxes against which the credit will apply subsequent to business and occupation taxes, carrier income taxes, severance taxes, telecommunications taxes, business franchise tax, corporation net income taxes and personal income taxes.

Before the credit may be applied against the consumers sales and service tax and use tax liabilities, it is necessary that the annual liabilities for the preceding taxes and the amount of credit available against those taxes be determined. Therefore, the business investment and jobs expansion tax credit must be taken against the consumers sales and service tax and use tax liabilities through a request for refund filed with the Tax Department at the end of each tax year.

5.10.2 In no case shall this credit offset any amount of sales or use tax which was included in the measure of investment in property purchased or leased for business expansion upon which qualified investment was based.

5.10.3 The credit may offset only the sales and use tax liabilities of the taxpayer claiming the credit. The credit shall never offset any portion of sales or use tax collected from customers of a taxpayer entitled to credit and held in trust by such taxpayer for remittance to the State.

5.11 Ad valorem property taxes; unemployment taxes and workers' compensation premiums.

5.11.1 After application of West Virginia Code §§ 11-13C-5(a) through (i), both inclusive, and sections 5.3 through 5.9, both inclusive, of these regulations and the subsections thereof, any unused credit shall be applied for payment of the sum of the following amounts as a rebate against the remaining twenty percent (20%) of the taxes enumerated in sections 5.3 through 5.9 of these regulations and the subsections thereof. This does not include the remaining twenty percent (20%) of the taxes enumerated in West Virginia Code § 11-13C-5(j) or section 5.10 of these regulations (the consumers sales and service tax and the use tax):

5.11.1.1 Eighty percent (80%) of the ad valorem property taxes imposed by levying bodies pursuant to West Virginia Code article 11-8 for the taxable year (including payments in lieu of such taxes), on property of the taxpayer that is directly attributable to the qualified investment (including

property having a useful life of less than four (4) years) of the taxpayer, in the new or expanded business facility of the taxpayer resulting in new jobs; plus

5.11.1.2 Eighty percent (80%) of the taxes imposed by West Virginia Code article 21a-5, for the taxable year attributable to the compensation of new employees filling the new jobs that are directly attributable to the qualified investment; plus

5.11.1.3 Twenty percent (20%) of the workers' compensation premiums imposed by West Virginia Code article 23-2 for the taxable year attributable to the compensation paid new employees filling the new jobs that are directly attributable to the qualified investment.

5.11.2 Ad valorem property tax against which the rebate credit may be taken is the property tax paid on plant and equipment type items. Property tax on inventory and on accounts receivable should be excluded from the measure of ad valorem property tax against which the rebate credit will apply.

5.11.2.1 Only ad valorem property taxes paid as a result of an actual assessment of ad valorem property tax issued upon qualified investment property on or subsequent to the date such property was placed in service or use will qualify for rebate credit.

5.11.2.2 In most instances the qualifying property is either new or is being placed into service for the first time. Such property is assessed on the first July 1st following the date placed into service. The resulting tax levy is then due during the year following the year of assessment. Due to a one (1) year delay between the assessment of tax and the actual payment of such tax, there is no property tax rebate available during the first year of business under this credit. Therefore, a typical business has only nine (9) years worth of property tax rebate unless that business elects to delay the beginning of the credit application for one (1) year.

5.11.2.3 A taxpayer is not entitled to rebate credit based upon ad valorem property tax paid on qualified investment property for periods prior to the placement of such property into service or use for purposes of this credit.

5.11.2.4 Payments into the catastrophe hazard and second injury hazard surplus fund by taxpayers who are workers' compensation self insurers under West Virginia Code § 23-2-9 may be offset by the rebate credit under West Virginia Code § 11-13C-5(j)(1)(c) as workers' compensation premiums.

5.11.3 A taxpayer eligible to claim this rebate shall apply either the amount of the unused credit or the sum determined under subsections 5.11.1 through 5.11.1.3 of these regulations, whichever is less, against the remaining twenty percent (20%) of the taxes imposed by West Virginia Code articles 11-12a, 13, 13a, 13b, 21, 23 and 24 attributable to the qualified investment under West Virginia Code article 11-13C. If any amount of rebate remains after its application against the remaining twenty percent (20%) of taxes as aforesaid, the amount remaining shall be carried forward to each ensuing tax year until used or expiration of the twelfth tax year subsequent to the tax year in which the qualified investment was placed in service or use in this State by the taxpayer.

5.11.3.1 The rebate credit carryforward can be applied in any taxable year from year two (2) to year thirteen (13) inclusive. It can reduce the business taxes, except for the sales and use taxes, to zero (0) without limitation to a percentage.

Obviously, no credit carryforward would be available in year one (1). However, credit could carry forward from year one (1) to year two (2) and

thereafter. Any credit carryforward remaining unused at the end of year thirteen (13) would be forfeited by operation of law. No carryover rebate credit would be available in year fourteen (14) or thereafter.

5.12 Unused credit forfeited. - If any credit remains after application of section 5.2 through section 5.11, both inclusive, of these regulations and subsections of such sections, the amount thereof shall be forfeited. No carryover to a subsequent taxable year or carryback to a prior taxable year shall be allowed for the amount of any unused portion of any annual credit allowance except as specifically provided in section 5.11 and the subsections thereof.

5.13 Payroll factor. - The term "all employees of the taxpayer employed in this state" for purposes of the West Virginia Code § 11-13C-5(c), (d), (e), (f), (g), (h), (i), (j)(1)(B) and (j)(1)(C) payroll factor determinations of taxes attributable to and the direct result of qualified investment must be interpreted to mean all full-time but not part-time employees employed by the taxpayer in West Virginia without regard to domicile or residency. For payroll factors applicable to certified projects under West Virginia Code §11-13C-4b, refer to section 4b.3.4 through 4b.3.4.6.d.2 of these regulations.

5.14 Taking of credit.

5.14.1 The business investment and jobs expansion tax credit can only be taken against taxes actually paid or payable by a taxpayer entitled to credit. No shifting of tax burdens by agreement would alter this disposition. No shifting of credit among entities, other than multiple party certified project participants, is allowed under the business investment and jobs expansion tax credit statute.

5.14.2 No prior certification by the Tax Commissioner is needed in order to take the business investment and jobs expansion tax credit under the nonproject provisions of the credit statute, except that for investment placed in service or use on or after January 1, 1990, an application for credit must be filed with the Tax Commissioner in accordance with West Virginia Code § 11-13C-14(f) and section 14.6 and the subsections thereof of these regulations.

5.14.3 In the case of a subsidiary of a West Virginia parent corporation which files a consolidated return, it will be necessary to apportion the tax liabilities of the consolidate filer by a payroll factor with a numerator equal to the West Virginia payroll directly attributable to the qualified investment and a denominator equal to the total West Virginia payroll of the consolidated filer. Exceptions to this requirement may be granted by the Tax Commissioner, upon request, but only if the taxpayer creates a pro forma separate filing for the subsidiary entitled to the business investment and jobs expansion tax credit for purposes of determining the amount of credit available. that credit may then be offset against the tax due under the consolidated filing. This latter method does not generally work for consolidated multistate taxpayers subject to tax under West Virginia Code articles 11-23 and 11-24. In no case shall the apportionment factor be applied in such a manner as to apply credit to shelter income not attributable to qualified investment from tax.

5.14.3 Credit would flow through to S corporation shareholders.

If an S corporation paid the business franchise tax or any other tax directly as an entity, then the shareholders themselves could not obtain any pass through credit against any liability for the same tax. The amount of credit remaining after the entity had taken credit would flow through to the shareholders in proportion to their ownership percentages precisely as would income of the S corporation. For multiple party projects, the shareholders should use the same payroll allocation percentage as the S corporation under West Virginia Code § 11-13C-4b(c)(3) and sections 4b.3.4 through 4b.3.4.5.d.2 or section 5.9.4.1, if applicable, of these regulations for determining the amount

of personal income tax against which the business investment and jobs expansion tax credit for the project can be taken. In the case of nonproject credit or a multiple year project, as opposed to a multiple party project, the numerator of the allocation fraction would be the West Virginia payroll of the S corporation attributable to qualified investment, and the denominator would be the total West Virginia payroll of the S corporation. This allocation percentage or the allocation percentage described under section 5.9.4.1 of these regulations, which is applicable, should be multiplied by the S corporation shareholders' personal income tax on income flowing through the S corporation as a conduit. This would determine the amount of personal income tax against which the credit can be taken by the S corporation shareholder.

5.14.5 Credit would flow through to partnership partners.

In the situation where partnerships take the credit, the procedure for the subsequent taking of the credit by the partners of the partnership is as follows. If the partnership paid business and occupation tax or any other tax directly as an entity, then the partners themselves cannot obtain the credit against any liability for the same tax. The partners should use the same payroll allocation percentage as the partnership. Generally, for a nonproject credit or a multiple year, nonmultiple party project, the numerator is West Virginia payroll of the partnership attributable to qualified investment and the denominator is West Virginia payroll of the partnership. That partnership payroll allocation percentage or the allocation percentage described under section 5.9.4.1 of these regulations, whichever is applicable, should be multiplied by the partner's share of taxon income flowing through the partnership as a conduit. This will determine the amount of tax against which the credit can be taken by the partner. The payroll factor would be determined for the business entity in accordance with these regulations.

5.15 Notwithstanding any provision of these regulations to the contrary, the taking of the credit set forth in West Virginia Code article 11-13C shall be subject to the provisions of West Virginia Code article 11-12B.

5.16. Determination of Tax Solely Attributable to and the Direct Result of Qualified Investment.

Under subsection 11-13C-5(b) of the West Virginia Code, the credits allowable under West Virginia Code Article 11-13C can offset only tax attributable to and the direct result of qualified investment. For those taxes enumerated in West Virginia Code Section 11-13C-5 which can be offset by West Virginia Code Article 11-13C credits, the determination of what portion of the taxpayer's total tax liability for each such tax that is "tax solely attributable to and the direct result of qualified investment" is typically made by multiplying the total liability for each tax by a payroll factor. The payroll factor typically consists of a fraction, the numerator of which is annual payroll of the taxpayer solely attributable to and the direct result of qualified investment, and the denominator of which is total annual West Virginia payroll of the taxpayer. As discussed in Section 4b.3.4 et seq., Section 5.13, Section 5.14.3 of these regulations, and other provisions of these regulations, the payroll factor may be adjusted to accommodate multiple party or multiple year project status for taxpayers, or to accommodate circumstances where taxpayers have gained entitlement to one or more concurrently applicable tax credits under West Virginia Code Article 11-13C, and to accommodate circumstances where there is a single, consolidated, composite or unitary tax filing unit.

Subsection 11-13C-5(j) of the West Virginia Code provides that for tax years beginning after December 31, 1992 and thereafter, if the payroll formula provisions of subsections 11-13C-5(c) through (i), inclusive, of the West Virginia Code, do not fairly represent the taxes solely attributable to and the direct result of the taxpayer's qualified investment, and that of all other project participants in the business or activity subject to tax, the Tax Commissioner may require the use of an alternative method of determining tax so

attributable that will effectuate an equitable attribution of the tax.

The enumerated methods are:

1) Separate accounting or identification; or

2) Adjustment to the wages formula to reflect all components of the tax liability; or

3) The inclusion of one or more additional factors which will fairly represent the taxes solely attributable to and the direct result of the qualified investment of the taxpayer and all other project participants in the businesses or other activities subject to tax; or

4) The employment of any other method to effectuate an equitable attribution of the taxes.

5.16.1. Reasons for Alternate Apportionment.

The purpose of the Business Investment and Jobs Expansion Tax Credit is to promote net employment growth within West Virginia. In return for net employment growth (e.g. 50 new jobs) through capital investment, the State provides tax credits to offset the additional taxes directly attributable to the qualified investment and new jobs. In no case should credits attributable to one qualified project apply to tax liability unrelated to that project. The purpose behind a mathematical formula (e.g. payroll factor) is to arrive at tax liability attributable to qualified investment or new jobs in situations where that amount is not clearly identifiable. If a mathematical formula (e.g. a payroll factor) fails to accomplish this result, then an alternative apportionment method may be prescribed by the Tax Commissioner. Examples where use of an alternative apportionment formula may be necessary are as follows. These examples are not intended to be all inclusive.

5.16.1.1 The amount of tax liability attributable to the qualified investment, calculated through use of the payroll factor or alternative apportionment method proposed by the taxpayer(s) is greater than the tax liability actually generated by the project, facility or operation directly related to the qualified investment and new jobs on which the credit is based.

5.16.1.2 Use of a payroll factor or other method of allocation results in credit being made available to offset the liabilities of the taxpayer in an amount larger than the amount of qualified investment made by the taxpayer.

5.16.1.3 There is payroll factor manipulation or mismatch. The payroll factor can sometimes be mismatched with relation to operations or tax generating activities resulting from qualified investment when compared to total overall operations or tax generating activities of a taxpayer. Mismatching can be the result of the inadvertent structural configuration of a taxpayer's operations, or it can result from deliberate manipulation of this configuration.

For example: Under prior Business Investment and Jobs Expansion Tax Credit Law, the West Virginia Severance Tax could be offset by the business investment and jobs expansion tax credit, and it can still be offset by taxpayers qualified under the transition rules of Section 11-13C-14 of the West Virginia Code.

A severance taxpayer "a mineral owner" could have a multitude of mineral properties producing a severance tax liability for the taxpayer.

1) If the taxpayer were to structure its operations so that all of its mineral properties were under production by contract miners, and

2) If the taxpayer formed a business investment and

jobs expansion tax credit multiple party project out of only one producing property (one of the many mineral properties owned by the taxpayer under production and causing a severance tax liability for the taxpayer), and

3) If the participants in the project consist only of the taxpayer and the contract miners working exclusively on the business investment and jobs expansion tax credit operation, and

4) If the employees of the contractors are exclusively employed in the business investment and jobs expansion tax credit operation, and

5) If the severance taxpayer had no West Virginia employees or only employees working on the business investment and jobs expansion tax credit project property,

then the payroll factor attributable to the qualified investment would be 100%.

The only employees attributable to qualified investment would be the West Virginia employees of the contract miners (and the project employees of the taxpayer, if applicable). All other mineral operations of the taxpayer generating the severance tax liability of the taxpayer would be operated by contract miners which are not participants in the project. Thus, the payroll attributable to these operations would not be included in the denominator of the payroll factor for the project participants.

The result of this structural configuration (whether inadvertent or deliberate) would be to create a payroll factor of 100%, which would allow the taxpayer to offset 100% of its severance tax liability, even though only a small part of its severance tax liability would in fact be attributable to qualified investment.

5.16.2 Alternate Methods for Determining Tax Attributable to Qualified Investment in Lieu of, or in Modification of, the Payroll Factor Method.

Under Subsection 11-13C-5(j) of the West Virginia Code, if application of the payroll factor does not fairly represent the taxes solely attributable to and the direct result of qualified investment of the taxpayer and all other project participants in the business or other activities subject to the tax, the Tax Commissioner may require, in respect to all or any part of the taxpayer's businesses or activities, if reasonable, any of the following methods or any combination thereof, for determining tax so attributable. These alternate methods shall be used when required by the Tax Commissioner in lieu of the payroll apportionment method, and where required, in lieu of the payroll apportionment methods prescribed in Section 4b of these regulations, and the subsections thereof, or any methods prescribed in any other sections of these regulations.

5.16.2.1 Separate Accounting or Identification.

This method entails the specific identification and quantification of tax solely attributable to and the direct result of qualified investment of the taxpayer or project participants. Required use of the separate accounting or identification method may result in total exclusion of one or more particular taxes from offset by the credit, and specific accounting or use of other apportionment methods as to other taxes.

Separate accounting may be based upon taxes specifically related to identifiable qualified investment property, operations arising from a facility constituting qualified investment property, operations directly identifiable

with employees employed to exclusively operate qualified investment property or equipment or to perform operations on a facility constituting qualified investment property, or upon any other basis; and such determination can be made upon a separate entity, unitary, composite or consolidated basis, and upon the basis of the affiliated group for all domestic affiliates or all domestic and foreign affiliates of a given taxpayer or of the participants in a business investment and jobs expansion tax credit project.

5.16.2.2. Adjustment to the wages formula to reflect all components of the tax liability.

This adjustment may entail the creation and application of a payroll factor which includes all or part of the payroll of all or some contractors and all or some contract labor for all or some entities which operate facilities for or otherwise produce income for the taxpayer whose tax attributable to and the direct result of qualified investment is to be determined. The payroll factor can be adjusted to create a payroll factor as discussed above, or otherwise as determined by the Tax Commissioner, determined on a separate entity, unitary, composite or consolidated basis, and upon the basis of the affiliated group for all domestic affiliates or all domestic and foreign affiliates of a given taxpayer or of the participants in a business investment and jobs expansion tax credit project.

5.16.2.3. The inclusion of one or more additional factors which fairly represent the taxes solely attributable to and the direct result of the qualified investment of the taxpayer and all other project participants in the businesses or other activities subject to tax.

5.16.2.3.1. In addition to, or in lieu of, the application of the payroll factor or an adjusted payroll factor or separate accounting or identification, or any combination thereof, as described in these regulations, the Tax Commissioner may prescribe application of a property factor.

The property factor is a fraction, the numerator of which is the average value of the individual taxpayer's or project participant's real and tangible personal property owned or rented by it in this State during the taxable year which constitutes property purchased or leased for business expansion as defined in Section 11-13C-3(b), and redefined in Section 11-13C-14(e) of the West Virginia Code; and the denominator of which is the average value of the individual taxpayer's or project participant's real and tangible personal property owned or rented and used by it in this State during the taxable year.

For purposes of calculating the property factor, property owned by the taxpayer or participant shall be valued at its original cost, adjusted by subsequent capital additions or improvements thereto and partial disposition thereof by reason of sale, exchange, abandonment, etc. Property rented by the taxpayer or participant from others shall be valued at eight (8) times the annual rental rate. The annual rental rate is the annual rent paid directly or indirectly, by the taxpayer or participant for its benefit, in money or other consideration for the use of property. This would include any amount payable for the use of real or tangible personal property or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise. It would also include any amount payable in additional rent or in lieu of rents, such as interest, taxes, insurance, repairs or any other items which are required to be paid by the terms of the lease or other arrangement, not including amounts paid as service charges, such as utilities charges, janitor service charges, etc. If a payment includes rent and other charges unsegregated, the amount of rent shall be determined by consideration of the relative values of the rent and other items.

The value of movable tangible personal property used both within and without this State shall be included in the denominator to the extent of its utilization in this State. The extent of such utilization is determined by multiplying the original cost of such property by a fraction, the numerator of

which is the number of days of physical location of the property in this State during the taxable period, and the denominator of which is the number of days of physical location of the property everywhere during the taxable year. The number of days of physical location of the property may be determined on a statistical basis or by such other reasonable method that is acceptable to the Tax Commissioner.

Leasehold improvements are treated as property owned by the taxpayer or participant regardless of whether the taxpayer or participant is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Leasehold improvements are included in the property factor at their original cost.

The average value of property is determined by averaging the values at the beginning and end of the taxable year. The Tax Commissioner may require the averaging of monthly values during the taxable year if substantial fluctuations in the values of the property exist during the taxable year, or where property is acquired after the beginning of the taxable year or is disposed of, or the rental contract ceases before the end of the taxable year.

5.16.2.3.1.2 The property factor can be applied alone, on in combination with one or more other factors or methods of allocation, as prescribed by the Tax Commissioner.

In the case of a simple direct application of the property factor not in combination with one or more other factors, the taxpayer's or participant's total tax liability for a given tax would be multiplied by the property factor.

Typically, where the property factor would be applied in combination with one other factor, the property factor would be added to the other factor, and the sum of the two factors would then be divided by two. The total tax liability would then be multiplied by the result in order to determine the amount of the tax liability solely attributable to and the direct result of qualified investment.

The Tax Commissioner can prescribe alternate methods for combining the property factor with other factors or other methods of determining tax solely attributable to and the direct result of qualified investment.

5.16.2.4. The employment of any other method to effectuate an equitable attribution of the taxes to reflect tax solely attributable and the direct result of qualified investment.

5.16.3. Under Subsection 11-13C-5(j) of the West Virginia Code, with regard to investment placed into service or use prior to April 10, 1993, taxpayers having a specific written determination from the Tax Commissioner that the taxpayer is authorized or required to take credit against tax not attributable to qualified investment shall not be subject to the alternative allocation of credit provided for under Subsection 11-13C-5(j) of the West Virginia Code.

5.16.3.1. In order for this exception to apply, it is necessary that a specific written determination shall have been made by the Tax Commissioner that credit may or must be applied against tax not attributable to qualified investment. This exception shall not be applicable where a written or other determination of the Tax Commissioner or of the Department of Tax and Revenue, or of its predecessor, the West Virginia Tax Department, has been made that a taxpayer may or must use the payroll factor in any configuration, or any other method of determining tax attributable to qualified investment, or of determining the portion of total tax liability to be offset by credit. The exception shall only apply where a specific written determination of the Tax Commissioner has been issued allowing or requiring that credit be applied specifically against "tax not attributable to qualified investment."

§ 110-13C-6. Qualified investment.

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

6.1.1 The cost of property purchased prior to March 1, 1985, but placed in service or use in a new or expanded business facility on or after that date and prior to March 10, 1990 can constitute a base for qualified investment. The cost of other property meeting the definition of property purchased or leased for business expansion as set forth in section 3 of these regulations can constitute a base for qualified investment.

6.2 Applicable percentage. - For the purpose of section 6.1 of these regulations, the applicable percentage of any property shall be determined under the following table:

IF USEFUL LIFE IS:	THE APPLICABLE PERCENTAGE IS:
4 years or more but less than 6 years or more	33-1/3
but less than 8 years or more	66-2/3
	100

The useful life of any property, for purposes of this section, shall be determined as of the date such property is first placed in service or use in this State by the taxpayer, determined in accordance with federal income tax law.

6.2.1 Without regard to the depreciation practice of the taxpayer, the life of an asset for purposes of the business investment and jobs expansion tax credit should be the actual economic life of the particular asset. The Department of Tax and Revenue will accept the so-called facts and circumstances doctrine formerly prevalent under federal income tax law. A taxpayer may use the federal income tax asset depreciation range midpoint useful life for purposes of the business investment and jobs expansion tax credit, but should increase or decrease that useful life if particular facts and circumstances applicable to the particular asset reasonably warrant such an adjustment.

The taxpayer may use another reasonable method of determining actual useful life. However, the Accelerated Cost Recovery System (ACRS) or Modified Accelerated Cost Recovery System (MACRS) depreciation periods may not be used to determine useful life for purposes of the business investment and jobs expansion tax credit.

6.3 Cost. - For purposes of section 6.1 of these regulations, the cost of each property purchased for business expansion shall be determined under the following rules:

6.3.1 Trade-ins. - Cost shall not include the value of property given in trade or exchange for the property purchased for business expansion.

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

6.3.3 Rental property.

6.3.3.1 the cost of real property acquired by written lease for a primary term of ten (10) years, or longer, shall be one hundred percent (100%) of the rent reserved for the primary term of the lease, not to exceed twenty

(20) years.

6.3.3.1.a A lease of realty must have a primary term of at least ten (10) years in order to qualify for the business investment and jobs expansion tax credit. The fact that a lease having a shorter primary term is renewable will not satisfy the ten (10) year primary term requirement. The right of a lessee to terminate a lease of real property with a stated term of ten (10) years or longer prior to the expiration of that term does not preclude such property from qualifying as qualified investment property as defined by the Business Investment and Jobs Expansion Tax Credit Act.

6.3.3.2 The cost of tangible personal property acquired by written lease for a primary term of:

6.3.3.2.a Four (4) years, or longer, shall be one-third of the rent reserved for the primary term of the lease;

6.3.3.2.b Six (6) years, or longer, shall be two-thirds of the rent reserved for the primary term of the lease; or

6.3.3.2.c Eight (8) years, or longer, shall be one hundred percent (100%) of the rent reserved for the primary term of the lease, not to exceed twenty (20) years: Provided, That in no event shall rent reserved include rent for any year subsequent to expiration of the book life of the equipment, determined using the straight line method of depreciation.

6.3.3.3 Where one (1) multiple party certified project participant leases project investment property as lessor to a project participant lessee, the measure of investment for the purposes of the business investment and jobs expansion tax credit is the cost of the property to the lessor rather than the rent reserved for the primary term of the lease. This is because the cost of the property to the project as an enterprise would be the amount paid to the non-participant from whom it is acquired by any project participant. Internal payments between project participants would not count as investments made by the project as an enterprise.

6.3.3.4 For property acquired or leased subsequent to March 10, 1990, property shall not be treated as rented or leased property which the taxpayer is required to show on its books and records as an asset under generally accepted accounting principles of financial accounting. If the taxpayer is prohibited from expensing the lease payments for federal income tax purposes, the property shall be treated as purchased property for purposes of this credit. See West Virginia Code § 11-13C-14(e)(5).

6.3.4 Property purchased for multiple use. - In the case of property purchased for use as a component part of a new or expanded business taxable under West Virginia Code article 11-12a and used as a component part of a new or expanded business taxable under West virginia Code article 11-13, the cost thereof shall be apportioned between such businesses. The amount apportioned to each such new or expanded business for which credit is allowed under West virginia code article 11-13C shall be considered as a qualified investment subject to the conditions and limitations of West Virginia Code article 11-13C.

6.3.4.1 Multiple use property will qualify for the business investment and jobs expansion tax credit in the amount of qualified investment apportionable to an enterprise entitled to credit. Actual usage of the property must be the criterion for apportioning the amount of investment attributable to the business investment and jobs expansion tax credit enterprise and the amount not so attributable. Apportionment of usage measured on the basis of time, units of production, power usage, payroll, raw materials usage or other means will be considered on a case-by-case basis.

In circumstances where the proportional usage of the multiple use property

between the qualified and nonqualified enterprises will be relatively stable throughout the ten (10) year credit period and is known or reasonably ascertainable, the investment apportioned to the qualified enterprise may be treated like any other qualified investment quantifiable at the time the qualified investment property is placed in service or use.

Credit would be available for the usual ten (10) year credit period (with possible rebate credit carryover up to year thirteen (13) for the amount of investment apportioned to the qualified enterprise adjusted by the useful life percentages set forth in West Virginia Code § 11-13C-6.

Where proportional usage of the multiple use property will vary significantly from year to year between the quantified investment will be treated as nonquantifiable investment. Such nonquantifiable investment in property placed in service or use subsequent to March 9, 1990 will not qualify for credit.

For multiple use property having such variable use from year to year placed in service or use prior to March 10, 1990, the amount of qualified investment in the property annually available and arising from that year will be total investment in the particular multiple use property, adjusted by the useful life percentage computation required by West Virginia Code § 11-13C-6(b), divided by ten (10) (the number of years over which the credit is applied), and then multiplied by the annual percentage of usage of the property in the qualified enterprise for the year.

$$\left(\frac{\text{Investment X Useful Life Percentage}}{10}\right) \times \text{Annual Usage Percentage}$$

This procedure will determine the amount of credit apportionable to the qualified enterprise for that year to be taken in that year and in each year thereafter for a total of ten (10) years.

The determination of this amount should be made for each year of the useful life of the property, and the amount so determined will then become an annual credit amount to be applied for a period of ten (10) years. Each year of useful life of the property up to ten years will add a layer of credit to be taken for ten (10) years. Thus, for example, for six (6) year property, credit would be created in year one (1) to be applied between years one (1) to ten (10), and in year six (6), credit would be created to be applied in year six (6) through year fifteen (15).

6.3.5 Self-constructed property. - In the case of self-constructed property, the cost thereof shall be the amount properly charged to the capital amount for depreciation in accordance with federal income tax law.

6.3.6 Transferred property. - The cost of property used by the taxpayer out-of-state and then brought into this State, shall be determined based on the remaining useful life of the property at the time it is placed in service or use in this State, and the cost shall be the original cost of the property to the taxpayer less straight line depreciation allowable for the tax years or portions thereof taxpayer used the property outside this State. In the case of leased tangible personal property, cost shall be based on the period remaining in the primary term of the lease after the property is brought into this State for use in a new or expanded business facility of the taxpayer; and shall be the rent reserved for the remaining period of the primary term of the lease, not to exceed twenty (20) years, or the remaining useful life of the property (determined as aforesaid), whichever is less.

6.3.7.1 Natural resources in place purchased or leased prior to March 10, 1990. - In the case of natural resources in place, the property must be capable of sustained production for a period of at least ten (10) years. If this qualification is met, then the qualified investment is one hundred percent (100%) of the purchase price of the natural resource in place that is

attributable to ten (10) years of production, but not more than twenty (20) years of production. If such price is not quantifiable at the time the mining operation is placed into production, cost shall be determined annually and shall be the amount of royalties actually paid to the owner of the natural resource in place during each year for a total period of ten (10) years. The amount of such royalties multiplied by the taxpayer's new jobs percentage (determined at the time the mining operation is placed in service or use) divided by ten (10) establishes the credit allowable each year for ten (10) successive years beginning with the year in which the royalties were paid. For purposes of this subsection the new jobs percentage is determined for years one (1) and two (2) according to the taxpayer's estimate of the number of new jobs which will be in place in year three (3), and is determined for year three (3) and all subsequent years in accordance with section 7.6 of these regulations.

6.3.7.1.a Although for property purchased or leased prior to March 10, 1990, lease or mineral royalty payments which are not quantifiable at the time investment is first placed in service or use by reason of the variability of the amount of payments to be made from period to period may be accumulated year by year for a period of ten (10) years, this provision merely sets out a procedure for measuring investment in property which could not be measured by determining the amount paid for the property at the time the property is placed in service or use. The statute does not permit the placement of property into service or use in any year beyond the first taxable year or in the case of multiple year certified projects, three (3) tax years. It merely determines the amount paid for that property over the ten (10) year use period of the property.

6.3.7.2 Natural resources in place purchased or leased subsequent to March 9, 1990. - Natural resources in place purchased or leased prior to March 1, 1985, or purchased or leased after March 1, 1985 pursuant to an option to purchase or lease such natural resources in place acquired prior to March 1, 1985 but exercised in whole or in part on or after March 10, 1990; and natural resources in place purchased or leased on or after March 10, 1990, unless pursuant to a written contract to purchase or lease executed prior to March 10, 1990, shall not constitute property purchased or leased for business expansion, and investment in such property shall not qualify for this credit.

6.3.8 Nonquantifiable investment. - Property purchased or leased on or after March 10, 1990, unless pursuant to a written contract to purchase or lease executed prior to March 10, 1990, the cost or consideration for which cannot be quantified with any reasonable degree of accuracy at the time such property is placed in service or use will not constitute property purchased or leased for business expansion upon which credit can be based: Provided, that when the contract of purchase or lease specifies a minimum purchase price or minimum annual rent the amount thereof shall be used to determine the qualified investment in such property under West Virginia Code § 11-13C-6 if the property otherwise qualifies as property purchased or leased for business expansion.

§ 110-13C-7. New jobs percentage.

7.1 In general. - The new jobs percentage is based on the number of new jobs created in this State that are directly attributable to the qualified investment of the taxpayer.

7.2 Applicable percentage. - For the purpose of section 7.1 of these regulations, the applicable new jobs percentage shall be determined under the following table:

IF THE NUMBER OF NEW JOBS IS:	THE APPLICABLE PERCENTAGE IS:
1,000	90
760	80
520	70

280	60
50	50

7.3 When a job is attributable. - An employee's position is directly attributable to the qualified investment if:

7.3.1 the employee's service is performed or his base of operations is at the new or expanded business facility;

7.3.2 The position did not exist prior to the construction, renovation, expansion or acquisition of the business facility and the making of the qualified investment, or will qualify as a saved job under West Virginia Code § 11-13C-14(e)(4); and

7.3.3 but for the qualified investment, the position would not have existed.

7.3.4 Where under a collective bargaining seniority system, new jobs at a new facility are actually filled by persons who have been employees of the taxpayer for some time and where the newly hired employees will back-fill the jobs vacated by such long-time employees, the positions created by the new investment will constitute new jobs for purposes of the business investment and jobs expansion tax credit, notwithstanding the fact that they are filled by employees who have been employed by the taxpayer in other positions for some time prior to the placement of the investment into service or use.

For purposes of making the payroll factor calculations required under West Virginia Code §§ 11-13C-4b and 11-13C-5, the payroll of new employees and "wages, salaries and other compensation paid during the taxable year to all employees of the taxpayer in this State, whose positions are directly attributable to the qualified investment" relating to such seniority system filled jobs will be the payroll of employees filling the new positions, not payroll of new hires employed to back-fill the existing positions.

7.3.5 The individuals holding new jobs can be replaced by other individuals, and the job title applicable to those jobs can be changed, and it is even possible that certain job positions may evolve into other functional positions involving new or different operational duties. However, it is necessary that the fifty (50) or more jobs created during the period between the applicable statutory dates be identified and continue in a manner traceable to their original creation. Only those jobs will county toward the determination of the amount of credit available.

For determining new jobs filled by new employees and for determining whether a job is attributable to qualified investment, it is irrelevant that job titles or job functions may change or that jobs are filled by individuals different from those originally holding the positions.

Factors which indicate that a job is directly attributable to qualified investment include, but are not limited to: the fact that a job is at or in a new business facility constituting qualified investment, that a job entails operation, maintenance, management or support of machinery or equipment which constitutes qualified investment, that a job did not exist prior to the placement of investment in service or use at a new or expanded business facility and that a job is an integral part of the business operation of a new business facility or of the expanded business operations of an expanded business facility.

7.3.5.1 If a project participant ended employment contracts with a participant which was a contract employer and replaced that contract employment with its own or some other participant's newly hired employees, the loss of the contract jobs from the project would not county as lost jobs if those jobs were then filled by new hires employed by any other participant in the project. The number of jobs attributable to the project investment would be

unchanged. It would be irrelevant that the project participant employing the persons filling the jobs had changed.

However, if a contractor providing jobs to the project were eliminated, and the jobs formerly performed by the contract employees were performed by employees who were already holding project jobs, then the total number of jobs attributable to project investment would decrease, and the jobs lost would be counted as such in making the new jobs determination for purposes of calculating the credit and for calculating the payroll factor for jobs attributable to qualified investment.

7.3.5.2 Construction worker jobs held during the construction of a facility or start-up management or start-up consulting jobs which are temporary or not permanent jobs resulting from the placement of qualified investment into service or use cannot qualify as new jobs even though such jobs may last for a substantial period of time, even a period of years.

7.4 <u>Certification of new jobs</u>. - With the annual return for the taxes imposed by West Virginia Code articles 11-12a or 11-13 filed for the taxable year in which the qualified investment is first placed in service or use in this State, the taxpayer shall estimate and certify the number of new jobs reasonably projected to be created by it in this State within the period prescribed in section 7.6 and the subsections thereof of these regulations, that are, or will be, directly attributable to the qualified investment of the taxpayer: <u>Provided</u>, That on and after July 1, 1987, the phrase "taxes imposed by West Virginia Code articles 11-12a or 11-13 (or both) shall mean taxes imposed by West Virginia Code articles 11-13, 11-13a, 13b, 21, 23, and 24 (or any one or combination of such articles).

7.5 <u>Equivalency of permanent employees</u>. - The hours of part-time employees shall be aggregated to determine the number of equivalent full-time employees for the purpose of section 7.2 hereof for the purpose of determining the new jobs percentage, but not for the purposes of section 7.3 hereof for purposes of determining the West Virginia Code § 11-13C-5(c), (d), (e), (f), (g), (h), (i), (j)(1)(B) and (j)(1)(C) payroll factor multiplier, but the West Virginia Code § 11-13C-4b(c)(3) multiple party certified project payroll factor will include part-time employees' payroll. <u>See</u> section 4b.3.4 through 4b.3.4.6.d.2 and section 5.13 of these regulations.

7.5.1 West virginia Code y 11-13C-7(e) reads as follows:

> <u>Equivalency of permanent employees</u>. - The hours of part-time employees shall be aggregated to determine the number of equivalent full-time employees for the purpose of subsection (b) hereof but not for the purposes of subsection (c) hereof.

This provision excludes part-time employees from qualifying as employees holding jobs "directly attributable to the qualified investment" under Section 11-13C-7(c).

West Virginia Code § 11-13C-4b(d) and West Virginia Code § 11-13C-3(b)(13) define a part-time basis job as one being performed at least twenty (20) hours per week for at least six (6) months during the taxable year. For temporary or seasonal jobs, unlike part-time jobs, as defined above, the hours cannot be aggregated to determine equivalent full-time employees. Indeed, temporary or seasonal employees are specifically excluded from the definition of "permanent employees" as defined in West Virginia Code §§ 11-13C-4b(d) and 11-13C-3(b)(13), and payroll of seasonal and temporary employees cannot be included in the apportionment fraction numerator for multiple party project participants or any other project or nonproject credit taker.

7.5.2 Only those part-time jobs where the employee is customarily performing work related duties at least twenty (20) hours per week for at least

six (6) months during the taxable year, may be counted as part-time jobs for which full-time job equivalency can be calculated for purposes of the business investment and jobs expansion tax credit under West virginia Code § 11-13C-7(e). Temporary or seasonal employment may not be counted toward the determination of the number of new jobs created for purposes of the credit.

7.5.3 If employees are employed for less than six (6) months during the year, even though they may work more than twenty (20) hours per week, or even a full forty (40) hours per week or more during that part of the year when they are working, they will not fall within the statutory definition of new employees, and may not be counted for the determination of the amount of the credit available. Likewise, any part-time job held by an employee working six (6) months or more per year but less than the statutory minimum of twenty (20) hours per week cannot be counted for the determination of the amount of credit available.

7.5.4 Jobs transferred into West Virginia from outside of the State will constitute new jobs for purposes of the West Virginia business investment and jobs expansion tax credit, provided that the new jobs are within West Virginia, are created within the statutory time requirements and are held by West virginia domiciled West Virginia residents. It is quite acceptable if persons domiciled or residing outside of West Virginia move into West Virginia and become West Virginia domiciled West Virginia residents in order to fill jobs created in or moved into West Virginia.

7.6 Redetermination of new jobs percentage. - With the annual return for the taxes imposed by West Virginia Code article 11-21 or 11-24, filed for the third taxable year in which the qualified investment is in service or use, the taxpayer shall certify the actual number of new jobs created by it in this State, that are directly attributable to the qualified investment of the taxpayer. For purposes of this credit, the third taxable year shall be the second tax year subsequent to the tax year during which investment is first placed in service or use. The third taxable year for multiple year certified projects is coterminous with the "three (3) year" multiple year investment period, as determined under section 4.3 of these regulations.

7.6.1 If the actual number of jobs created would result in a higher new jobs percentage, the credit allowed under West Virginia Code article 11-13C shall be redetermined and amended returns filed for the first and second taxable years that the qualified investment was in service or use in this State.

7.6.2 If the actual number of jobs created would result in a lower new jobs percentage, the credit previously allowed under West Virginia Code article 11-13C shall be redetermined and amended returns filed for the first and second taxable years. In applying the amount of redetermined credit allowable for the two preceding taxable years, the redetermined credit shall first be applied to the extent it was originally applied in such prior two (2) years to personal income taxes, then to corporation net income taxes, then to business franchise taxes, then to telecommunications taxes, then, for credit relating to original taxable periods prior to March 10, 1990, to severance taxes, then to carrier income taxes and lastly to business and occupation taxes, then to the sales and use taxes. Any additional taxes due under West Virginia Code chapter 11 shall be remitted with the amended returns filed with the Tax Commission, along with interest, as provided in West Virginia Code § 11-10-17, and a ten percent (10%) penalty, which may be waived by the Tax Commissioner if the taxpayer shows that the overclaimed amount of the new jobs percentage was due to reasonable cause and not due to willful neglect.

7.6.2.1 West Virginia Code § 11-13C-3(b)(13), in defining the term "new employees" for the purpose of determining the number of new jobs attributable to qualified investment, states, in relevant part, that:

> In no case shall the new employees allowed for purposes of this credit exceed the total increase in the taxpayer's

employment in this state.

Thus, the allowable amount of credit must always be based upon the net number of new jobs created. Any decrease in the number of West Virginia employees in any area or segment of a taxpayer's business must county directly against the number of new jobs attributable to qualified investment over the (generally) ten (10) year credit period.

7.6.3 Calculation of new jobs attributable to qualified investment placed in service or use after March 9, 1990.

7.6.3.1 The taxpayer shall determine the number of new jobs in place in the third taxable year or, for small businesses, any taxable year, attributable to qualified investment by calculating the average number of full-time and equivalent part-time new employees holding new jobs attributable to qualified investment for each month of the third taxable year or, for small business taxpayers, the taxable year, then totalling the monthly averages and dividing that total by twelve (12).

7.6.3.2 The Tax Commissioner may prescribe alternative methods for determining the number of new jobs in place in the third taxable year or, for small businesses, any taxable year, attributable to qualified investment in circumstances where such alternative methods are determined by the Tax Commissioner to be appropriate for ascertaining an accurate and realistic determination of new jobs attributable to qualified investment.

7.6.4 Calculation of new jobs attributable to qualified investment placed in service or use prior to March 10, 1990.

7.6.4.1 The number of new jobs in place in the third taxable year attributable to qualified investment shall be determined as the average of the number of full-time and equivalent part-time new employees holding new jobs attributable to qualified investment employed by the taxpayer on the first day of the third taxable year and the last day of the third taxable year.

7.6.4.2 At the taxpayer's election the taxpayer may determine the number of new jobs in place in the third taxable year or, for small businesses, any taxable year, attributable to qualified investment by calculating the average number of full-time and equivalent part-time new employees holding new jobs attributable to qualified investment for each month of the third taxable year or for small business taxpayers, the taxable year, then totalling the monthly averages and dividing that total by twelve (12): Provided, That use of this section is mandatory for small business taxpayers, and is not subject to election.

7.6.4.3 The Tax Commissioner may prescribe alternative methods for determining the number of new jobs in place in the third taxable year attributable to qualified investment in circumstances where such alternative methods are determined by the Tax Commissioner to be appropriate for ascertaining an accurate and realistic determination of new jobs attributable to qualified investment.

§ 110-13C-7a. Small business credit.

7a.1 For purposes of these regulations and West Virginia Code § 11-13C-7a the term small business is defined in section 3.26 and the subsections thereof of these regulations. The annual gross payroll and annual gross receipts amounts described in section 3.26 of these regulations shall be prescribed by increasing the amount of each by the cost-of-living adjustment for such calendar year. Such increase shall be calculated based upon the statutory annual payroll and annual gross receipts amounts prescribed for the period of July 1, 1987 to December 31, 1988. The annual gross payroll, annual gross receipts and median annual compensation requirements of this section and section 3.26 of these regulations shall first be determined for any taxpayer in the year when

qualified investment is first placed in service or use as determined in accordance with section 4 and the subsections thereof of the regulations.

7a.1.1 Cost of living adjustment. - For purposes of this section and the subsections thereof, the cost-of-living adjustment for any calendar year is the percentage (if any) by which:

7a.1.1.1 The consumer price index for the preceding calendar year exceeds

7a.1.1.2 The consumer price index for the calendar year 1987.

7a.1.2 Consumer price index for any calendar year. - For purposes of subsection 7a.1.1, the consumer price index for any calendar year is the average of the Federal Consumer Price Index as of the close of the twelve (12) month period ending on August 31 of such calendar year.

7a.1.3 Consumer price index. - For purposes of subsection 7a.1.2, the term "Federal Consumer Price Index" means the last consumer price index for all urban consumers published by the United States Department of Labor.

7a.1.4 Rounding. - If any increase under subsection 7a.1.1 is not a multiple of fifty dollars ($50), such increase shall be rounded to the next lowest multiple of fifty dollars ($50).

7a.2 Amount of credit allowed.

7a.2.1 Credit allowed. - An eligible small business taxpayer shall be allowed a credit against the portion of taxes described in West Virginia Code § 11-13C-5 imposed by this State that are attributable to and the direct consequence of the eligible small business taxpayer's qualified investment in a new or expanded business in this State which results in the creation of at least ten (10) new jobs. The amount of this credit shall be determined as provided in West Virginia Code § 11-13C-7a and this section 7a of these regulations and the subsections thereof.

7a.2.2 Amount of credit. - The amount of credit allowable under this section and West Virginia Code § 11-13C-7a is determined by dividing the amount of the eligible small business taxpayer's qualified investment (determined under section 6 of these regulations) in "property purchased for business expansion" (as defined in section 3 of these regulations) by ten (10). The amount of qualified investment so apportioned to each year of the ten (10) year credit period shall be the annual measure against which the taxpayer's annual new jobs percentage (determined under subsection 7a.4) is applied. The product of this calculation establishes the maximum amount of credit allowable each year for ten (10) consecutive years under this section due to the qualified investment.

7a.2.3 Application of credit. - The annual credit allowance must be taken beginning with the taxable year in which the taxpayer places the qualified investment into service or use in this State, unless the taxpayer elects to delay the beginning of the ten (10) year credit period until the next succeeding taxable year. This election shall be made in the annual income tax return filed under West Virginia Code chapter 11 by the taxpayer for the taxable year in which the qualified investment is placed in service or use. Once made, this election cannot be revoked. The annual credit allowance shall be taken and applied in the manner prescribed in West virginia Code § 11-13C-5 and section 5 of these regulations and the subsections thereof.

7a.3 New jobs. - The term "new jobs" has the meaning ascribed to it in section 3 of these regulations: Provided, That the median compensation of such new jobs shall not be less than eleven thousand dollars ($11,000) per year and that beginning January 1, 1989, and each January 1st thereafter, the Tax Commissioner shall adjust the median annual compensation specified in this

section by increasing the amount thereof by the annual cost-of-living adjustment determined under section 7a.1 of these regulations and the subsections thereof.

7a.3.1 Median annual compensation shall be not less than the following amounts for the following time periods:

Period	Median Annual Compensation Not Less Than
July 1, 1987 to December 31, 1988	$11,000
January 1, 1989 to December 31, 1989	$11,450
January 1, 1990 to December 31, 1990	$12,000

7a.3.2 Median annual compensation shall be determined by arranging the annual compensation amount of each employee in a hierarchy ranking such amounts from lowest to highest and then selecting that element from the range of so arranged amounts (elements) which is the "middle number," i.e., that element which has an equal number of elements in the range of elements which rank above and below it.

7a.3.3 In the case of a range having an even number of elements, the median is the average of the two (2) "middle numbers," i.e., one half (1/2) of the sum of the highest ranked element of the lower half of the range and the lowest ranked element of the upper half of the range.

EXAMPLE 1:

An employer has fifteen employees each of whom has an annual compensation as follows:

	Annual Compensation		Annual Compensation
Employee 1	12,000	Employee 9	75,176
Employee 2	14,545	Employee 10	60,000
Employee 3	100,250	Employee 11	9,800
Employee 4	50,123	Employee 12	10,111
Employee 5	28,189	Employee 13	11,111
Employee 6	32,047	Employee 14	15,207
Employee 7	8,000	Employee 15	17,000
Employee 8	16,030		

The range of elements from lowest to highest is:

Rank		Rank	
1.	8,000 lowest ranked element	9.	17,000
2.	9,800	10.	28,189
3.	10,111	11.	32,047
4.	11,111	12.	50,123
5.	12,000	13.	60,000
6.	14,545	14.	75,176
7.	15,207	15.	100,250 highest ranked element
8.	16,030 median element		

The median element or the "middle number" in the range is the 8th ranked element. In this example, the median compensation of the business is $15,207. Out of 15 elements, 7 elements are ranked below the 8th element and 7 elements are ranked above the 7th element. Median compensation is $16,030.

EXAMPLE 2:

A business has 12 employees, each of whom is annually compensated as follows:

	Annual Compensation		Annual Compensation
Employee 1	9,542	Employee 7	12,418
Employee 2	10,121	Employee 8	10,000
Employee 3	175,007	Employee 9	10,125
Employee 4	21,068	Employee 10	9,166
Employee 5	19,270	Employee 11	270,000
Employee 6	15,500	Employee 12	11,125

The range of elements from lowest to highest is:

	Rank		
	1.	9,166	lowest ranked element
Lower	2.	9,542	
Half	3.	10,000	
	4.	10,121	
	5.	10,125	
	6.	11,125}	
------		}	$\frac{11,125 + 12,418}{2}$ = \$11,771.50 median
	7.	12,418}	
	8.	15,500	
Upper	9.	19,270	
Half	10.	21,068	
	11.	175,007	
	12.	270,000	highest ranked element

The average of the highest ranked element of the lower half of the range and the lowest ranked element of the upper half of the range is $11,771.50. This is the median for the given range.

7a.3.4 The compensation of an employee employed on a seasonal or temporary basis or not employed full time as defined under section 3.15.2.3 of these regulations or an employee not employed part-time as defined under section 3.15.2.2 of these regulations shall not be counted in the determination of the median salary.

7a.3.5 For purposes of determining median compensation for part-time employees, the salaries of such employees shall be "annualized."

7a.3.5.1 the salary of a part-time employee is annualized by multiplying the hourly compensation of the part-time employee by the number of hours in the normal work year for full-time employees of the business.

7a.3.5.2 The annualized compensation for each part-time employee is treated as an element in the range of numbers used to determine median annual compensation of the business.

<u>EXAMPLE 3</u>:

A part-time employee of a business works 27 hours per week, 50 weeks per year, and is not entitled to paid vacation. The normal work week of a full-time employee of the business is 40 hours per week, and full-time employees are paid for 52 weeks per year, including 2 weeks paid vacation. The part-time employee makes $6.00 per hour. The number of hours in a normal work year for full-time employees is:

40 Hr./Week X 52 Weeks Per Year = 2080 Hr./Year

Although the part-time employee works only 1350 hours per year for total annual gross compensation of $8,100, the annualized compensation of the part-time employee would be 2080 Hr./Year X $6.00 Per Hour = $12,480.

The figure to be used in the range of numbers determining median compensation is $12,480, and not $8,100. However, for purposes of finding annual gross payroll for the determination of whether a business has annual gross receipts and annual gross payroll in amounts which are less than the threshold amounts specified by West virginia Code § 11-13C-7a, § 11-13C-14 and section 3.26 and this section of these regulations for qualification of a business as a small business, the actual payroll, which would include only eight thousand one hundred dollars ($8,100) for this employee, would be used.

7a.3.6 The term "new employee" shall have the meaning ascribed to it in section 3 of these regulations: Provided, That such term shall not include: employees filling new jobs who are related individuals, as defined in subsection (i), section 51 of the Internal Revenue Code of 1986, or a person who owns ten percent (10%) or more of the business with such ownership interest to be determined under rules set forth in subsection (b), section 267 of said Internal Revenue Code; or a person who worked for the taxpayer during the six (6) month period ending on the date taxpayer's qualified investment is placed in service or use and is rehired by the taxpayer during the six (6) month period beginning on the date taxpayer's qualified investment is placed in service or use.

7a.3.7 When a job is attributable. - An employee's position is directly attributable to the qualified investment if:

7a.3.7.1 The employee's service is performed or his base of operations is at the new or expanded business facility;

7a.3.7.2 The position did not exist prior to the construction, renovation, expansion or acquisition of the business facility and the making of the qualified investment; and

7a.3.7.3 But for the qualified investment, the position would not have existed.

7a.4 New jobs percentage. - The annual new jobs percentage is based on the number of new jobs created in this State by the taxpayer that is directly attributable to taxpayer's qualified investment.

7a.4.1 If at least ten (10) new jobs are created and filled during the taxable year in which the qualified investment is placed in service or use, the applicable new jobs percentage shall be thirty percent (30%): Provided, That for each new job over ten (10), up to forty (40) such additional new jobs, the applicable new jobs percentage shall be increased by adding thereto one half of one percent (.5%), with the maximum new jobs percentage not to exceed fifty percent (50%).

7a.4.2 During each of the remaining nine (9) years of the ten (10) year credit period, the annual new jobs percentage shall be based on the average number of new jobs that were filled during that taxable year: Provided, That for purposes of estimating the new jobs percentage that will be applicable for each subsequent credit year, the taxpayer shall use the new jobs percentage allowable for the taxable year immediately prior thereto, and in the annual income tax return filed under West virginia Code, chapter 11 for the then current tax year, taxpayer shall redetermine his allowable new jobs percentage for that year based on the average number of new employees employed in new jobs during that year (determined on a monthly basis) and calculated under section 7.6.3 of these regulations created as the direct result of taxpayer's qualified investment.

7a.4.2.1 For purposes of the small business tax credit, the taxpayer estimates the number of new jobs which will be in place for the first taxable year in which qualified investment is placed in service or use, and the taxpayer files monthly or quarterly tax returns and pays estimated tax for the year based upon the amount of credit which would be available given the estimated number of new jobs. At the end of the taxable year, the actual number

of new jobs in place attributable to qualified investment is determined and annual returns are filed reconciling the estimated tax paid monthly and quarterly filings throughout the year and the actual amount of annual tax due based upon the actual new jobs percentage for the year determined at the end of the year. The amount of tax paid in monthly and quarterly tax returns for years two (2) through ten (10) is then based upon estimated credit calculated using the prior year's actual new jobs number.

After the close of the taxable year for years two (2) through ten (10), annual returns are filed reconciling the estimated tax paid in the monthly and quarterly filings throughout the year and the actual amount of annual tax due based upon the actual new jobs percentage for the year determined at the end of the year.

7a.4.3 Small business taxpayers which make qualified investment and which are not entitled to a multiple year certified project shall be allowed credit for the qualified investment placed in service or use over three hundred sixty-five (365) consecutive days in accordance with section 4.3 of these regulations, without regard to when the end of the taxpayer's taxable year occurs. The determination of the number of new jobs created for the first taxable year and the determination of median compensation shall be made at the end of the said three hundred sixty-five (365) day period. The annual gross receipts and annual payroll determinations shall be made in accordance with sections 3.26.1 and 3.26.2 of these regulations as appropriate, and shall be applied at the end of the tax year of the taxpayer during which the said three hundred sixty-five (365) day period begins. The determination of new jobs in place attributable to qualified investment, annual gross receipts, annual payroll and median compensation shall be made at the end of the three hundred sixty-five (365) day period for the first tax year when investment is in service or use. Such determinations shall be made for the next succeeding tax year and subsequent years based upon the taxpayer's actual tax year.

<u>For Example</u>:

A small business taxpayer commences business on August 1, 1990, and places its first item of property purchased or leased for business expansion into service or use on that date. The small business elects to file its federal and state income taxes and other taxes on a calendar year basis.

The small business taxpayer will be required to file its annual federal and state tax returns for its first tax year based upon a short taxable year for the period from August 1, 1990 to December 31, 1990. However, the small business taxpayer's qualified investment upon which credit will be based will be the qualified investment attributable to property purchased or leased for business expansion placed in service or use by the small business taxpayer over the three hundred sixty-five (365) day period from August 1, 1990 to July 31, 1991, notwithstanding the fact that the taxpayer's tax year ended on December 31, 1990.

The determination of annual gross payroll and annual gross income shall be made at the end of the short tax year (ending December 31, 1990) under section 3.26.2 of these regulations. The determination of median compensation and the determination of the number of new jobs in place attributable to qualified investment shall all be made on July 31, 1991 based upon the preceding three hundred sixty-five (365) days, including July 31, 1991.

The amount of qualified investment actually in service or use in the short tax year shall be the qualified investment upon which credit for that year shall be based, i.e., property placed in service or use from August 1, 1990 to December 31, 1990. Total qualified investment in service or use on July 31, 1991 shall be the amount of qualified investment upon which the 1991 and subsequent year's credit shall be based.

The current tax year of the taxpayer during which the three hundred

sixty-five (365) day period ends (on July 31, 1991) is the tax year of January 1 to December 31, 1991.

The annual payroll, annual gross receipts and annual median compensation requirements which must be initially met by the taxpayer in order to qualify for the small business credit are the requirements in effect for calendar year 1990, the year during which the taxpayer first placed its qualified investment into service or use. See section 7a.3 of these regulations.

For the calendar year 19909 these requirements were as follows:

annual payroll	$1,700,000
annual gross receipts	$5,500,000
annual median compensation	$ 12,000

The taxpayer will qualify as a small business taxpayer for the short tax year of August 1, 1990 to December 31, 1990 if annual payroll and annual gross receipts, both measured over the period of August 1, 1990 to December 31, 1990, and computed in accordance with section 3.26.2 of these regulations are both, respectively, less than $1,700,000 and $5,500,000.

If the taxpayer qualifies as a small business taxpayer under these annual gross payroll and annual gross receipts criteria, the taxpayer would go on to determine its entitlement to credit. If it does not qualify as a small business, it would not be eligible for small business credit and could obtain business investment and jobs expansion tax credit only if it met the fifty (50) jobs requirement as set forth in West Virginia Code § 11-13C-7 and other requirements of the statute.

Assuming the taxpayer qualifies as a small business, as described above, it will next determine whether it is entitled to small business credit. If the taxpayer created at least ten (10) new jobs attributable to qualified investment, based upon a monthly average (as described under section 7.6.4.2 or 7.6.4.3, should the Tax Commissioner specify an alternative method, of these regulations), over the period of August 1, 1990 to July 31, 1991, and if the median compensation of new jobs over the period of August 1, 1990 to July 31, 1991 was at least twelve thousand dollars ($12,000), then the taxpayer will be entitled to take the small business tax credit against its tax liabilities for the short tax year of August 1, 1990 to December 31, 1990 and against its tax liabilities for the tax year of January 1, 1991 to December 31, 1991. Presuming the taxpayer estimated the amount of tax credit which would be available to it correctly, it would have filed its monthly and quarterly tax returns and its short year annual tax returns for 1990 taking the credit against tax in the accurate amounts, and will file annual tax returns for 1991 reflecting the amount of credit available.

If the taxpayer failed to qualify for the credit or if it estimated the amount of credit inaccurately in its quarterly and monthly filings and in its short year annual tax returns, the taxpayer would be required to file amended 1990 annual tax returns for the short tax year and would pay taxes due with interest and a ten percent (10%) penalty (which can be waived in certain circumstances, see section 7.6 of these regulations); or the taxpayer would take a greater amount of credit if it were entitled to more credit than was taken in the short tax year. The taxpayer will likewise file its annual tax returns for January 1, 1991 to December 31, 1991 and pay more tax or take more credit, as appropriate, so as to reconcile the total amount of monthly and quarterly tax remittance made throughout the year with the actual amount of tax owed, if any, for the tax year.

For the January 1, 1992 to December 31, 1992 tax year, the taxpayer will calculate the annual gross payroll, annual gross receipts, median compensation and new jobs in place attributable to qualified investment based upon actual measurements of these amounts over the year from January 1, 1992 to December 31, 1992. However, monthly and quarterly tax payments for 1992 would be made based

upon estimates which use the annual gross payroll and annual gross receipts determinations of section 3.26.2 of these regulations based on the January 1, 1991 to December 31, 1991 tax year and actual measurements for median compensation and new jobs in place in the 1991 calendar year. Such estimates for 1993 monthly and quarterly payments would be based upon the January 1, 1992 to December 31, 1992 measurements. Refer to section 7a.4.2.1 of these regulations, which prescribes use of the prior year's measurements for current year estimates.

The taxpayer will take credit for a ten (10) year period (or longer if rebate credit on multiple year project provisions are applicable). The ten (10) year credit period (disregarding any possible longer period or election to delay the beginning of the taking of credit by one (1) year pursuant to West virginia Code § 11-13C-4) would end on July 31, 2000. The taxpayer would take credit against taxes accrued for the period of January 1, 2000 to July 31, 2000, and credit would be taken on monthly and quarterly returns filed for that period, and on the annual return filed for the period of January 1, 2000 to December 31, 2000. But credit would be taken only against the portion of the annual tax liability attributable to the January 1 to July 31 portion of the year.

7a.4.4 Small business taxpayers which make qualified investment and which are entitled to a multiple year certified project shall determine annual gross receipts and annual gross payroll in accordance with the procedures set forth in section 3.26.1 and 3.26.2 of these regulations and shall determine median compensation and the number of jobs attributable to qualified investment based upon the procedures set forth in section 3.26.1 and 3.26.2 of these regulations for a three hundred sixty-five (365) day period beginning on the date when investment is first placed in service or use. However, the taxpayer shall place investment into service or use over the three (3) year investment period described in section 4.3 and subsections thereof of these regulations, rather than over a three hundred sixty-five (365) day period.

7a.4.5 A small business taxpayer shall use the method prescribed in section 7.6.4.1 or 7.6.4.2 of these regulations for determining new jobs attributable to qualified investment unless the Tax Commissioner prescribes an alternative method under section 7.6.3.2 or 7.6.4.3 of these regulations.

7a.5 Certification of new jobs. - With the annual income tax return filed under this chapter for each taxable year during the ten (10) year credit period, the taxpayer shall certify:

7a.5.1 The new jobs percentage for that taxable year;

7a.5.2 The amount of the credit allowance for that year;

7a.5.3 If the business is a partnership or electing small business corporation, the amount of credit allocated to the partners or shareholders, as the case may be;

7a.5.4 That qualified investment property continues to be used in the business, or if any of it was disposed of during the year, the date of disposition, and that such property was not disposed of prior to expiration of its useful life, as determined under West Virginia Code § 11-13C-6;

7a.5.5 That the new jobs created by the qualified investment continue to exist and are filled by persons who meet the definition of new employees (as defined section 7a.3 of this regulation) and are paid a median annual compensation equal to or greater than the minimum median annual compensation required by these regulations.

7a.6 Small business project. - A small business may apply to the Tax Commissioner under West Virginia Code § 11-13C-4b for certification of a West Virginia Code § 11-13C-4b(a)(1) project if that project will create at least ten (10) new jobs. Only multiple year projects may be certified for small business

tax credit takers. Multiple party projects may not be certified for small tax credit takers.

7a.6.1 A taxpayer making qualified investment and operating with a multiple year certified project would use substantially the same procedure as a taxpayer entitled to credit for investment made over one (1) year except that qualified investment would be made over three (3) taxable years. The three (3) year investment period would begin and end as described in section 4.3 of these regulations for multiple year projects. The amount of qualified investment actually in service or use at the end of each tax year shall be the amount upon which credit for such tax year shall be determined.

7a.7 Regulations. - West Virginia Code § 11-13C-7a states that the Tax Commissioner shall prescribe such regulations as he may deem necessary in order to determine the amount of credit allowed under West Virginia Code § 11-13C-7a to a taxpayer; to verify taxpayer's continued entitlement to claim such credit; and to verify proper application of the credit allowed. The Tax Commissioner may, by regulation, require a taxpayer intending to claim credit under this section to file with the Tax Commissioner a notice of intent to claim this credit, before the taxpayer begins reducing his monthly or quarterly installment payments of estimated tax for the credit provided in this section.

7a.8 Effective date. - The credit provided in West Virginia Code § 11-13C-7a shall be allowed for qualified investment property purchased or leased after June 30, 1987.

§ 110-13C-8. Forfeiture of unused tax credits; redetermination of credit allowed.

8.1 Disposition of property or cessation for use. - If during any taxable year, property with respect to which a tax credit has been allowed under West Virginia Code article 11-13C:

8.1.2 Is disposed of prior to the end of its useful life, as determined under West Virginia Code § 11-13C-6; or

8.1.3 Ceases to be used in an eligible business of the taxpayer in this State prior to the end of its useful life, as determined under said West Virginia Code § 11-13C-6, then the unused portion of the credit allowed for such property shall be forfeited for the taxable year and all ensuing years. Additionally, except when the property is damaged or destroyed by fire, flood, storm or other casualty, or is stolen, the taxpayer shall redetermine the amount of credit allowed in all earlier years by reducing the applicable percentage of cost of such property allowed under said West virginia Code § 11-13C-6, to correspond with the percentage of cost allowable for the period of time that the property was actually used in this State in the new or expanded business of the taxpayer. Taxpayer shall for periods prior to July 1, 1987 then file a reconciliation statement with its annual business and occupation tax return or carrier income tax return, for the year in which the forfeiture occurs and pay any additional taxes owed due to reduction of the amount of credit allowable for such earlier years, plus interest and any applicable penalties. For taxable periods beginning on or after July 1, 1987, such reconciliation statement shall be filed with the annual return for the primary tax for which the taxpayer is liable under West Virginia Code articles 11-13, 11-13a, 11-13b or 11-23. Taxpayers not subject to tax under any of these articles shall file such statement with the annual return filed for the tax due under West Virginia Code article 11-21.

8.2 Cessation of operation of business facility. - If during any taxable year the taxpayer ceases operation of a business facility in this State for which credit was allowed under West Virginia Code article 11-13C, before expiration of the useful life of property with respect to which tax credit has been allowed under West Virginia Code article 11-13C, then the unused portion of the allowed credit shall be forfeited for the taxable year and all ensuing

years. Additionally, except when the cessation is due to fire, flood, storm or other casualty, the taxpayer shall redetermine the amount of credit allowed in earlier years by reducing the applicable percentage of cost of such property allowed under West Virginia Code § 11-13C-6, to correspond with the percentage of cost allowable for the period of time that the property was actually used in this State in a business of the taxpayer that was taxable under West Virginia Code articles 11-12a or 11-13 prior to July 1, 1987 or West Virginia Code articles 11-13, 11-13A, 11-13B or 11-23 on and after July 1, 1987. Taxpayer shall for periods prior to July 1, 1987 then file a reconciliation statement with its annual business and occupation tax return or carrier income tax return for the year in which the forfeiture occurs, and pay any additional taxes owed due to reduction of the amount of credit allowable for such earlier years, plus interest and any applicable penalties. For taxable periods beginning on or after July 1, 1987, such reconciliation statement shall be filed with the annual return for the primary tax for which the taxpayer is liable under West Virginia Code articles 11-13, 11-13A, 11-13B or 11-23. Taxpayers not subject to tax under any of these articles shall file such statement with the annual return filed for the tax due under West Virginia Code article 11-21.

8.3 Reduction in number of employees. - If during any taxable year subsequent to the taxable year in which the new jobs percentage is redetermined as provided in West Virginia Code § 11-13C-7, the average number of employees of the taxpayer, for the ten current taxable year, employed in positions created because of and directly attributable to the qualified investment falls below the minimum number of new jobs created upon which the taxpayer's annual credit allowance is based, the taxpayer shall calculate what his annual credit allowance would have been had his new jobs percentage been, determined based upon the average number of employees, for the then current taxable year, employed in positions created because of and directly attributable to the qualified investment. The difference between the result of this calculation and the taxpayer's annual credit allowance for the qualified investment as determined under West Virginia Code § 11-13C-4, shall be forfeited for the then current taxable year, and for each succeeding taxable year unless for such succeeding taxable year the taxpayer's average employment in positions directly attributable to the qualified investment once again meets the level required to enable the taxpayer to utilize its full annual credit allowance for that taxable year. Such treatment shall also apply for small business credit takers under West Virginia Code § 11-13C-7a.

8.3.1 This forfeiture causes a loss of the credit in the forfeiture year, and all forfeiture years shall be counted in the ten (10) year credit period (which may extend to thirteen (13) years or longer by reason of carryover rebate credit, the taking of credit arising from nonqualified investment or other factors), so that the ten (10) year (or longer) period shall be shortened by one (1) year with the passage of a forfeiture year. In no case shall the occurrence of a forfeiture year be interpreted to toll or delay the running of the ten (10) year (or longer) credit period.

§ 110-13C-9. Transfer of qualified investment to successors.

9.1 Mere change in form of business. - Property shall not be treated as disposed of under West virginia Code § 11-13C-8, by reason of a mere change in the form of conducting the business as long as the property is retained in a business in this State, and the taxpayer retains a controlling interest in the successor business. In this event, the successor business shall be allowed to claim the amount of credit still available with respect to the business facility or facilities transferred, and the taxpayer (transferor) shall not be required to redetermine the amount of credit allowed in earlier years.

9.2 Transfer or sale to successor. - Property shall not be treated as disposed of under West Virginia Code § 11-13C-8 by reason of any transfer or sale to a successor business which continues to operate the business facility in this State. Upon transfer or sale, the successor shall acquire the amount of credit that remains available under this article for each subsequent taxable

year and the taxpayer (transferor) shall not be required to redetermine the amount of credit allowed in earlier years.

9.3 Where a corporation entitled to take the credit is purchased through a stock purchase by a new owner and remains a legal entity and retains its corporate identity, the entitlement of the corporation to the credit will not be affected by the ownership change.

9.4 Where a corporation entitled to the credit is merged with another corporation and ceases to exist as an entity, the surviving corporation would be treated as a successor business under West Virginia Code § 11-13C-9(b), and would be entitled to the credit and project certification to which the predecessor corporation was originally entitled. It would be necessary subsequent to the merger for the surviving corporation to substantially maintain the number of jobs directly attributable to qualified investment and the qualified investment property in service or use carried over from the predecessor corporation.

9.5 An S corporation resulting from the conversion of a C corporation to an S corporation is the product of a mere change in the form of doing business, or, at most, is a successor business, under West Virginia Code § 11-13C-9. In such a case, any business investment and jobs expansion tax credit available to the C corporation would be available to the S corporation.

9.6 Under ordinary circumstances the only way in which two or more companies or entities can aggregate their employees and investment for purposes of the business investment and jobs expansion tax credit is to form a certified project under West Virginia Code § 11-13C-4b. West Virginia Code § 11-13C-4b(b) requires that a taxpayer apply to the Tax Commissioner for certification of a project prior to placing qualified investment property into service or use for purposes of the business investment and jobs expansion tax credit.

Under West Virginia Code § 11-13C-9, the business investment and jobs expansion tax credit is not lost by reason of a mere change in the form of conducting a business or the transfer or sale of a business to a successor.

Where one corporation will be split into two (2) corporations but substantially the same assets and the same employees upon which the original business investment and jobs expansion tax credit was based will carry on with business operations, and where the second corporation will be a newly formed entity using employees whose position with the first corporation prior to the split-up constituted new jobs for purposes of the business investment and jobs expansion tax credit, and where investment qualified for the business investment and jobs expansion tax credit in place with the first corporation will substantively continue to be used in the second corporation, these factors indicate a situation more akin to a change in the form of the business rather than a pooling of assets or effort by two independent corporations to create an investment project. The situation described substantively constitutes a change in the form of the business for purposes of the business investment and jobs expansion tax credit.

West Virginia Code § 11-13C-4b(a)(2) describes a project configuration whereby two or more entities may take the business investment and jobs expansion tax credit. Although the configuration and business relationships resulting from the described split-up do not constitute a certified project, this statutory section most closely addresses the situation described. Two corporations resulting from the aforesaid change in the form of conducting business may take the West Virginia business investment and jobs expansion tax credit in the same manner and as if there existed a certified project under West Virginia Code § 11-13C-4b(a)(2).

9.7 Although the entity principle applies to partnerships as participants in a certified business investment and jobs expansion tax credit project and for tax filing purposes, the actual legal entitlements to property and income and

other legal rights flow through the partnership, as a conduit, to the partners.

Presumably, if a partnership is owned by corporate partners, the partnership could be acquired as an entity through a purchase of the corporate partners.

If a partnership continues as an entity, the entitlement to the credit will remain undisturbed in it. If a partnership is sold so that a successor business takes the place of the partnership, then the successor business will be entitled to the credit under West Virginia Code § 11-13C-9(b) if qualified investment property and jobs remain in place with the successor.

Under West virginia law, a partnership ordinarily pays certain taxes as an entity (such as the business and occupation tax, the severance tax and the business franchise tax), but other taxes such as the personal income tax, or, in the case of corporate partners, the corporate net income tax, are paid by the partners on the income derived from the partnership under the conduit principle. The business investment and jobs expansion tax credit can offset personal income tax and corporation net income tax as well as the business and occupation, severance and franchise taxes. Therefore, the business investment and jobs expansion tax credit available to a partnership will flow through to the partners for the income taxes, but will be taken directly by the partnership against the business and occupation, severance and business franchise taxes. Thus, a new partner or successor partner would be entitled to the credit under West Virginia Code § 11-13C-9(b) on that portion of income subject to income taxes flowing from the partnership. Refer to sections 5.14.4 and 5.14.5 for treatment of S corporation shareholders and partners.

9.8 The presumption underlying the ninety (90) day shut-down rule, set forth in West Virginia Code § 11-13C-3(b)(12)(D), is that if a business is shut down for ninety (90) days, all jobs are lost and the cessation of business by the facility is permanent. If a purchaser then buys the assets formerly in operation at the facility and hires employees to work at the facility, that purchaser will have made new investment and will have created new jobs. The business investment and jobs expansion tax credit statute presumes that without such investment the shut-down property would have remained closed, and no jobs would have been created.

The ninety (90) day shut-down rule ordinarily comes into play only where a purchaser is attempting to buy a facility from a seller and the facility is not subject to the credit in the hands of the seller.

The situation where a purchaser buys a facility which has been idle for over ninety (90) days from a seller who cannot take the credit and where the purchaser thereby becomes qualified for the credit must be distinguished from the situation where the seller is entitled to the business investment and jobs expansion tax credit and then sells the qualified investment to a purchaser who becomes a successor in the business of the seller.

In the former case, the purchaser must independently qualify for the business investment and jobs expansion tax credit, and a ninety (90) day shut-down of the facility (or the Tax Commissioner's waiver thereof) is necessary. In the later case, the seller has already qualified for the credit, no shut-down is necessary, the purchaser becomes a successor in business to the seller and, under West Virginia Code § 11-13C-9(b), obtains entitlement to the business investment and jobs expansion tax credit to the exact same extent that the seller was so entitled.

9.9 Treatment of successor project participants. - Whenever a participant in a project certified under West Virginia Code §§ 11-13C-4b(a)(2) or (3) is replaced by another participant in that project on or after March 10, 1990, the tax credits available to such successor participant as a result of the transfer shall not exceed the amount of credits that would have been available to the predecessor participant had the transfer to the successor participant not

occurred: Provided, That if the project plan provides for annual recalculation of the division of the credit allowable for each year among the participants in the project in order to maximize the collective use of such credit by the project participants, or for any other purpose, then the credit available to the successor participant as a result of the transfer shall be limited each year to the amount of credit actually used by the predecessor participant to offset taxes for the taxable year immediately preceding the taxable year in which such participant's obligations or interest in the project, as described in the project plan certified by the Tax Commissioner, passed to the successor participant in the project.

9.10 Predecessors in business shall disclose to successors in business all records, documents and other information necessary for the successor to maintain entitlement to the credit, to calculate the amount of credit available to the successor and to file tax returns taking the credit. A successor in business shall be considered an interested party under West Virginia Code § 11-10-5d(f) with relation to such information of the predecessor. The Tax Commissioner shall have absolute discretion to grant or refuse disclosure of information under this section.

§ 110-13C-10. Identification of investment credit property.

Every taxpayer who claims credit under West Virginia Code article 11-13C shall maintain sufficient records to establish the following facts for each item of qualified property:

10.1 Its identity;

10.2 Its actual or reasonably determined cost;

10.3 Its straight-line depreciation life;

10.4 The month and taxable year in which it was placed in service;

10.5 The amount of credit taken; and

10.6 The date it was disposed of or otherwise ceased to be qualified property.

§ 110-13C-11. Failure to keep records of investment credit property.

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

11.2 A taxpayer shall be treated as having disposed of, during the taxable year, any investment credit property which the taxpayer cannot establish was still on hand, in this State, at the end of that year.

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

§ 110-13C-12. Interpretation and construction.

12.1 No inference, implication or presumption of legislative construction or intent shall be drawn or made by reason of the location or grouping of any particular section, provision or portion of West Virginia Code article 11-13C; and no legal effect shall be given to any descriptive matter or heading relating to any section, subsection or paragraph of West Virginia Code article 11-13C.

12.2 Prior to March 10, 1990 the provisions of West virginia Code article 11-13C were liberally construed in order to effectuate the legislative intent recited in West Virginia Code § 11-13C-2.

However, on and after March 10, 1990 this rule was replaced with a rule of reasonable construction in which the burden of proof is on the taxpayer to establish by clear and convincing evidence that the taxpayer is entitled to the benefits allowed by West Virginia Code article 11-13C.

§ 110-13C-13. Severability.

13.1 If any provision of West Virginia Code article 11-13C or the application thereof shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of said article, but shall be confined in its operation to the provision thereof directly involved in the controversy in which such judgment shall have been rendered, and the applicability of such provision to other persons or circumstances shall not be affected thereby. The same treatment shall be adopted for these regulations.

13.2 If any provision of West Virginia Code article 11-13C or the application thereof shall be made invalid or inapplicable by reason of the failure of the Legislature to enact any statute therein addressed or referred to, or by reason of the repeal or any other invalidation of any statute therein addressed or referred to, such failure to reenact on such repeal or invalidation of any such statute shall not affect, impair or invalidate the remainder of the said article, but shall be confined in its operation to the provision thereof directly involved with, pertaining to, addressing or referring to the said statute, and the application of such provision with regard to other statutes or in other instances not affected by any such invalid or repealed statute shall not be abrogated or diminished in any way.

§ 110-13C-14. Restrictions and limitations on credits allowed by West Virginia Code article 11-13C.

14.1 By legislation passed on March 10, 1990 the West Virginia Legislature made the following finding:

> The Legislature finds that the tax credits allowed under provisions of this article (West Virginia Code article 11-13C) heretofore enacted have not effectively and efficiently increased employment through investment in a certain industry segments; that while there has been a significant net decrease in employment in the coal industry in recent years the amount of credit being claimed by producers of coal has significantly increased; that the increasing cost of the credits allowed by this article to coal producers is eroding the State's ability to reasonably fund essential State services such a public education, public safety and basic human services; and that this erosion will continue unless remedial legislation is enacted.

14.2 Construction. - The rule of statutory construction codified in West Virginia Code § 11-13C-12b is replaced by statutory mandate effective March 10, 1990 with a rule of reasonable construction in which the burden of proof is on the taxpayer to establish by clear and convincing evidence that the taxpayer is entitled to the benefits allowed by West Virginia Code article 11-13C.

14.3 Credit not to be applied against severance taxes.

14.3.1 Notwithstanding any provision in West Virginia Code article 11-13C to the contrary, no credit shall be allowed against the taxes imposed by West Virginia Code article 11-13A (the severance tax) for taxable years ending

on or after March 10, 1990 unless one of the transition rules in West Virginia Code § 11-13C-14(c)(2) applies.

14.3.2 Transition rules. - The general rule stated in West Virginia Code § 11-13C-14(c)(1) and section 14.3.1 of these regulations shall not apply:

14.3.2.1 To qualified investment property placed in service or use prior to March 10, 1990.

14.3.2.2 To property purchased or leased for business expansion that is placed in service or use on or after March 10, 1990 if at least one of the following clauses applies to such property:

14.3.2.2.a The new or expanded business facility was constructed, reconstructed or erected, pursuant to a written construction contract executed prior to March 10, 1990, as limited to the provisions of such contract as of such date then binding on the taxpayer, but only to the extent such new or expanded business facility is placed in service or use prior to January 1, 1992.

14.3.2.2.b The new or expanded business facility which is part of a project described in West Virginia Code § 11-13C-4b(a)(1) was constructed, reconstructed or erected, pursuant to a written construction contract executed prior to March 10, 1990 as limited to the provisions of such contract as of such date then binding on the taxpayer: Provided, That only that portion of the contract price attributable to that percentage of the construction contract completed prior to January 1, 1992 (determined under principles set forth in Section 460(b) of the Internal Revenue Code of 1986, as in effect before March 10, 1990) which is placed in service or use prior to January 1, 1992 may be treated as property purchased for business expansion under West Virginia Code § 11-13C-6.

14.3.2.2.c The new or expanded business facility was purchased or leased pursuant to a written contract executed prior to March 10, 1990 as limited to the provisions then binding on the taxpayer as of such date, but only to the extent such new or expanded business facility is placed in service or use prior to January 1, 1992.

14.3.2.2.d The machinery or equipment or other tangible personal property purchased or leased for business expansion at a new or expanded business facility was purchased or leased by the taxpayer pursuant to a written contract to purchase or lease identifiable tangible personal property executed before March 10, 1990, as limited to the provisions of such written contract then binding on the taxpayer, but only to the extent the tangible personal property purchased or leased under such contract is placed in service or use before January 1, 1992: Provided, That when such tangible personal property is purchased or leased as aforesaid as part of a project described in subsection 14.3.2.2.b of these regulations, such tangible personal property must be placed in service or use prior to January 1, 1994, to be treated as property purchased or leased for business expansion under West Virginia Code § 11-13C-6.

14.3.2.3 Transition Rule 3. - The general rule provided in paragraph 14.3.1 shall not apply to property purchased or leased for business expansion that is placed in service or use after March 9, 1990 as a component part of a plan for an integrated project which is otherwise eligible for super tax credit under W. Va. Code § 11-13C-4b, provided all of the following requirements are satisfied:

14.3.2.3.a Investment Threshold. - The taxpayer and other participants in the project, if any, have made investments aggregating more than ten million dollars in property purchased or leased for business expansion (as defined in W. Va. Code § 11-13C-3(b)(19) prior to enactment of § 11-13C-14), prior to March 10, 1990.

14.3.2.3.a.1 This requirement that the taxpayer and other participants in the project, if any, have made investments aggregating more than ten million dollars prior to March 10, 1990, in "property purchased or leased for business expansion," as defined in W. Va. Code § 11-13C-3(b)(19), is satisfied if property purchased or leased for business expansion, as defined in W. Va. Code § 11-13C-3(b)(19), is purchased, or leased, prior to March 10, 1990 and the contract to purchase, or lease, irrevocably obligates the taxpayer or any other participant in the project, if any, to purchase, or lease, identifiable property for a sum certain amount.

14.3.2.3.a.2 Property is deemed to have been purchased before March 10, 1990 if: (i) the physical construction, reconstruction or erection of the property was begun prior to March 10, 1990, or the property was constructed, reconstructed, erected or acquired pursuant to a written contract in existence and binding on the purchaser before March 10, 1990; or (ii) the machinery, equipment or other tangible personal property was owned by the taxpayer or another participant in the project, if any, prior to March 10, 1990, or was acquired by the taxpayer or another participant in the project, if any, pursuant to a binding purchase contract executed prior to March 10, 1990.

14.3.2.3.a.3 Property is deemed to have been leased before March 10, 1990 only if the taxpayer or another participant in the project, if any, took physical possession of the leased property prior to March 10, 1990, or there was a binding written lease or contract to lease identifiable tangible personal property in effect prior to March 10, 1990 for a specified term for specified periodic consideration.

14.3.2.3.b <u>Integrated Project Rule</u>. - Investment aggregating more than ten million dollars must have been made pursuant to a written plan for development of an integrated corporate project, in one or two phases, over a period of one or more years, which otherwise qualifies for credit under West Virginia Code § 11-13C-4b. This written plan must have been in existence prior to March 10, 1990 and provide for the making of additional investments after March 9, 1990, in furtherance of the plan for an integrated corporate project. The existence of such a plan is a matter of fact to be determined on a case-by-case basis, the burden of proof is on the taxpayer to show the interrelationship between the several phases or parts of the project and the dependency of any subsequent investment on the qualifying investment of more than ten million dollars.

14.3.2.3.b.1 Existence of a written plan for development of an integrated corporate project is demonstrated by the written plan itself. Proof that the written plan existed prior to March 10, 1990 may be demonstrated by corporate minutes of meetings of boards of directors or shareholders held prior to March 10, 1990 which discuss the plan, or which authorize the expenditure of more than ten million dollars in "property purchased or leased for business expansion," as defined in West Virginia Code § 11-13C-3(b)(19), to implement the plan or any integrated phrase or part thereof. The plan's existence may also be proved from submissions to federal or State regulatory authorities including, but not limited to, the Federal Energy Regulatory Commission and the Securities and Exchange Commission, which refer to the integrated corporate project in sufficient detail or by applications for financing of the integrated project which describe the project in sufficient detail.

14.3.2.3.b.1.a There must be clear, convincing evidence of an approved corporate plan or other action of the taxpayer showing positive commitment to the full development of the plan for an integrated corporate project prior to March 10, 1990.

14.3.2.3.b.1.b There must be clear, convincing evidence that development, design or engineering had begun prior to March 10, 1990 on any section 11-13C-4b(a)(1) project that encompasses any thirty-six

consecutive month period that begins after March 9, 1990, when it is claimed that such section 11-12C-4b(a)(1) project is an integrated part or phase of an plan for an integrated corporate project that spans more than three years.

14.3.2.3.b.2 A plan consists of two integrated phases or parts when there is clear, convincing evidence that but for phase one, phase two of the plan would not have been started and completed. Additionally, a plan is not an integrated plan unless each subsequent phase is directly in furtherance of and contributes to the primary objective of the plan. The following criteria is indicative of the existence of an integrated corporate project:

14.3.2.3.b.2.a The investment made prior to March 10, 1990, was made with the expectation of making additional investment after March 9, 1990 which qualifies a second section 11-13C-4b(a)(1) project under the super tax credit law and that project is directly related to the pre-March 10, 1990 investment.

14.3.2.3.b.2.b The two super tax credit section 11-13C-4b(a)(1) projects are dependent on or contribute to each other.

14.3.2.3.b.2.c The corporate project is limited to a single "business facility" as defined in West Virginia Code § 11-13C-3(b); and the "mining operations," as defined in section 11-13C-3(b) are contained on contiguous property and are part of a single operating unit. Factors which indicate that the mining operations are part of a single operating unit are:

14.3.2.3.b.2.c.1 common processing or treatment plant,

14.3.2.3.b.2.c.2 common storage and loading facility,

14.3.2.3.b.2.c.3 other common support facilities, and

14.3.2.3.b.2.c.4 common supervisory personnel.

14.3.2.3.b.2.d Notification was given to the Tax Commissioner, prior to March 10, 1990, that a corporate project consists of two section 11-13C-4b(a)(1) projects.

Business strategy and planning is generally limited to five year increments. A taxpayer who applies for super tax credit under this third transition rule for more than one section 11-13C-4b(a)(1) project that begins after March 9, 1990, must present clear and convincing evidence of significant economic loss should taxpayer's investment in such project not be eligible for super tax credit that offsets the severance tax imposed by article thirteen-a of the West Virginia Code.

The following example demonstrates the intent of this paragraph 14.3.2.3.b.2.

Example: XYZ Coal Company has written plan to develop its Rocky Mountain Coal Project. Phase I consists of assembling (by purchase or lease) the coal lands necessary to economically sustain coal production once all phases of the project are completed; obtaining necessary State and federal permits; obtaining necessary financing and doing anything else that may be necessary to move into phase II. Phase II consists of developing and operating one or more strip mines on the project site. This includes development of access roads and a coal loading facility. During this phase anything else necessary to move into phase III is done. Phase III consists of construction, or development, and operation of the following on project land previously stripped:

(1) a coal preparation plant incorporating the most current coal preparation technology;

(2) unitrain coal loading facilities;

(3) three deep mines; and

(4) all related facilities.

Under these facts, this is an integrated multi-phase project.

14.3.2.3.b.3 An integrated project is otherwise eligible for super tax credit, under West Virginia Code § 11-13C-4b, to the extent the entire project, or any phase thereof, qualifies for credit under West Virginia Code § 11-13C-4b. In order to qualify for super tax credit, there must be both investment in property purchased or leased for business expansion and the creation of at least fifty new jobs by the taxpayer or any other participant in the project as a direct result of that investment. Because a section 11-13C-4b(a)(1) multi-year project is limited to qualified investment property placed in service or use during any three successive tax years that directly results in the creation of at least fifty new jobs filled by new employees, a multi-year integrated corporate project is only eligible for super tax credit benefits <u>to the extent</u> that one or more portions of the integrated project satisfies the section 11-13C-4b(a)(1) requirements. The following examples illustrate the meaning of this rule.

<u>Example 1</u>. Prior to March 10, 1990, XYZ Coal Company (Taxpayer) made investment in property purchased or leased for its Rocky Mountain Coal Project aggregating more than $10 million. All of that property was placed in service during calendar years 1987, 1988 and 1989. As a direct result of that investment 100 new jobs were created and filled by new employees during that period. XYZ Coal Company timely applied to the Tax Commissioner for certification of this phase of its integrated project. Certification was granted and XYZ Coal Company began taking the super tax credit. During calendar year 1990, XYZ Coal Company timely filed with the Tax Commissioner notice of claim to super tax credit under the section 11-13C-14(c) transition rules. In 1991, Taxpayer placed in service project property valued at $250,000 and created five new jobs. During calendar years 1992, 1992 and 1994. The property placed in service during 1990 is not eligible for super tax credit because it did not result in the creation of at least fifty new jobs. While Taxpayer could have grouped the years 1991, 1992 and 1993 together as a section 11-13C-14b(a)(1) project, it would not have been allowed to claim super tax credit for the $5 million of project property placed in service in calendar year 1994 which resulted in the creation of 25 new jobs. For this reason, Taxpayer elected to treat the years 1992-1994 as a section 11-13C-4b(a)(1) project rather than the years 1991-1993. During calendar year 1995, Taxpayer placed in service additional Rocky Mountain Coal Project property valued $1 million which created 10 new jobs. No super tax credit benefits are allowable with respect to the investment placed in service during 1995.

<u>Example 2</u>: Same facts as in Example 1, except that during 1991 XYZ Coal Company placed in service a new strip mine that is not part of its Rocky Mountain Coal Project. Property placed in service is valued at $750,000 and 55 new jobs were created. Because the new mine is not a part of the Rocky Mountain Coal Project, super tax credit for that investment may not be used to offset severance taxes on coal produced from that strip mine. Super tax credit may be applied against other taxes directly attributable to that mine, in accordance with the remaining provisions of West Virginia Code § 11-13C-5.

14.3.2.3.c <u>New Business Facility Rule</u>. - The portion of the integrated project constructed, purchased, or leased, after March 9, 1990 must satisfy the definition "new business facility" codified in West Virginia Code § 11-13C-14(e)(3).

14.3.2.3.d <u>New Jobs Rule</u>. - The new jobs created by the project after March 9, 1990 must be filled by "new employees" as defined in West Virginia Code § 11-13C-14(e)(4).

14.3.3 Notice of claim under transition rules.

14.3.3.1 <u>Notice required</u>. - Any person intending to assert a claim for credit based in whole or in part on application of the transition rules in West Virginia Code § 11-13C-14(c)(2)(B) or (C) must have filed written notice of such intention with the Tax Commissioner on or before July 1, 1990. In the case of a multiparticipant project, this notice may have been filed by the managing project participant on behalf of all participants in such project. Such notice shall have been in a form prescribed by the Tax Commissioner and all information required by such form shall have been provided.

14.3.3.2 <u>Failure to file notice</u>. - If any person fails to timely file the notice required by West Virginia Code § 11-13C-14(c)(3), such person shall be precluded from claiming credit under West Virginia Code article 11-13C for such investment.

14.4 <u>Treatment of successor project participants</u>. - Whenever a participant in a project certified under West Virginia Code § 11-13C-4b(a)(2) or (3) is replaced by another participant in that project on or after March 10, 1990, the tax credits available to such successor participant as a result of the transfer shall not exceed the amount of credits that would have been available to the predecessor participant had the transfer to the successor participant not occurred: <u>Provided</u>, That if the project plan provides for annual recalculation of the division of the credit allowable for each year among the participants in the project in order to maximize the collective use of such credit by the project participants, or for any other purpose, then the credit available to the successor participant as a result of the transfer shall be limited each year to the amount of credit actually used by the predecessor participant to offset taxes for the taxable year immediately preceding the taxable year in which such participant's obligations or interest in the project, as described in the project plan certified by the Tax Commissioner, passed to the successor participant in the project.

14.5 The following terms are defined or redefined on and after March 10, 1990 for purposes of the business investment and jobs expansion tax credit:

14.5.1 <u>"Construction contract."</u> - For definition, refer to section 3 of these regulations.

14.5.2 <u>"Excluded property."</u> - For definition, refer to section 3 of these regulations.

14.5.3 <u>"New business facility."</u> - For definition, refer to section 3 of these regulations.

14.5.4 <u>"New employee."</u> - The terms "full-time employee" and "permanent employment" are defined under this heading. For definition, refer to section 3 of these regulations.

14.5.5 <u>"Leased property."</u> - For definition, refer to section 3 of these regulations.

14.5.6 <u>"Small business."</u> - For definition, refer to section 3 and section 7a of these regulations.

14.5.7 <u>"Annual payroll."</u> - For definition, refer to section 3 and section 7a of these regulations.

14.5.8 <u>"Annual gross receipts."</u> - For definition, refer to section 3 and section 7a of these regulations.

14.5.9 "Affiliates." - For definition, refer to section 7a of these regulations.

14.5.10 "Concern." - For definition, refer to section 7a of these regulations.

14.6 Application for credit required.

14.6.1 Application required. - Notwithstanding any provision of West Virginia Code article 11-13C to the contrary, no credit shall be allowed or applied under West Virginia Code article 11-13C for any qualified investment property placed in service or use on or after January 1, 1990 until the person asserting a claim for the allowance of credit under West Virginia Code article 11-13C makes written application to the Tax Commissioner for allowance of credit as provided in West Virginia Code § 11-13C-14(f) and receives written acknowledgement of its receipt from Tax Commissioner: Provided, That in the case of a multiparticipant project this notice may be filed by the managing project participant on behalf of all participants in that project. An application for credit shall be filed no later than the last day of the due date, without extensions, for filing the tax returns required under West Virginia Code articles 11-21 or 11-24 for the taxable year in which the property to which the credit relates is placed in service or use and all information required by such form shall be provided.

14.6.2 Failure to file. - The failure to timely apply for the credit in accordance with section 14.6.1 of these regulations shall result in the forfeiture of fifty percent (50%) of the annual credit allowance otherwise allowable under West Virginia Code article 11-14. This penalty shall apply annually until such application is filed.

14.6.2.1 For purposes of this section, the penalty of fifty percent (50%) of the annual credit allowance otherwise allowable under West Virginia Code article 11-14 means that the amount of the actual decrease in the taxpayer's tax liability which would result from application of the credit, if the penalty were not imposed shall be eliminated in the amount of fifty percent (50%), i.e., the actual tax liability shall increase by fifty percent (50%) of the amount of offset which would have been available had the penalty not been applied.

14.7 These regulations are issued pursuant to the mandate of West Virginia Code § 11-13C-14(g).

14.8 Studies and reviews. - The Tax Commissioner shall review the accounts of all taxpayers who are currently claiming tax credits under West Virginia Code article 11-13C for the purpose of ensuring that such credits are being claimed only in accordance with West Virginia Code article 11-13C. The Tax Commissioner shall report his findings and conclusions based on such reviews at the 1991 regular session of the Legislature along with recommendations for any further legislative change: Provided, That the confidentiality of all taxpayers and taxpayer information shall be preserved in such report and that this report shall in no way be deemed to affect future enforcement of West Virginia Code § 11-13C-14.

14.9 Effective date.

14.9.1 Except as otherwise expressly provided in West virginia Code § 11-13C-14, the provisions of West Virginia Code § 11-13C-14 shall apply to property placed in service or use on or after March 10, 1990, notwithstanding any provision of prior law which may be in conflict with West Virginia Code § 11-13C-14. In the case of any such ambiguity, the provisions of West virginia Code § 11-13C-14 shall control resolution of such ambiguity.

14.9.2 The date of passage of West Virginia Code § 11-13C-14 is March 10, 1990.

§ 110-13C-15. Definition of controlled group of corporations.

15.1 In general. - For purposes of West Virginia Code § 11-13C-14 and the regulations thereunder, the term "controlled group of corporations" means any group of corporations which is either a "parent-subsidiary controlled group" (as defined in paragraph 15.2), a "brother-sister controlled group" (as defined in paragraph 15.3), or a "combined group" (as defined in paragraph 15.4). For the exclusion of certain stock for purposes of applying these definitions, see section 15A of these regulations.

15.2 Parent-subsidiary controlled group. - The term "parent-subsidiary controlled group" means one or more chains of corporations connected through stock ownership with a common parent corporation if stock possessing at least fifty percent (50%) of the combined voting power of all classes of stock entitled to vote or at least fifty percent (50%) of the total value of shares of all classes of stock of each corporation (except the stock of the common parent corporation) is owned (directly or indirectly) by one or more of the other corporations; and the common parent corporation owns (directly or indirectly) stock possessing at least fifty percent (50%) of the total combined voting power of all classes of stock entitled to vote or at least fifty percent (50%) of the total value of shares of all classes of stock of at least one of the other corporations (excluding, in computing such voting power or value, stock owned directly by such other corporations). This definition of a parent-subsidiary controlled group of corporations is illustrated by the following examples:

Example (1). P Corporation owns stock possessing 50 percent of the total combined voting power of all classes of stock entitled to vote of S Corporation. P is the common parent of a parent-subsidiary controlled group consisting of member corporations P and S.

Example (2). Assume the same facts as in example (1). Assume further that S owns stock possessing 50 percent of the total value of shares of all classes of stock of T Corporation. P is the common parent of a parent-subsidiary controlled group consisting of member corporations P, S, and T. The result would be the same if P, rather than S, owned the T stock.

Example (3). L Corporation owns 80 percent of the only class of stock of M Corporation and M, in turn, owns 40 percent of the only class of stock of O Corporation. L also owns 50 percent of the only class of stock of N Corporation and N, in turn, owns 40 percent of the only class of stock of O. L is the common parent of a parent-subsidiary controlled group consisting of member corporations L, M, N, and O.

Example (4). X Corporation owns 75 percent of the only class of stock of Y and Z Corporations; Y owns all the remaining stock of Z; and Z owns all the remaining stock of Y. Since intercompany stockholdings are excluded (that is, are not treated as outstanding) for purposes of determining whether X owns stock possessing at least 50 percent of the voting power or value of at least one of the other corporations, X is treated as the owner of stock possessing 100 percent of the voting power and value of Y and of Z for purposes of this paragraph. Also, stock possessing 100 percent of the voting power and value of Y and Z is owned by the other corporations in the group within the meaning of this paragraph. (X and Y together own stock possessing 100 percent of the voting power and value of Z, and X and Z together own stock possessing 100 percent of the voting power and value of Y.) Therefore, X is the common parent of a parent-subsidiary controlled group of corporations consisting of member corporations X, Y and Z.

15.3 Brother-sister controlled group. - The term "brother-sister controlled group" means two or more corporations if the same five or fewer persons who are individuals, estates, or trusts own (directly or indirectly) singly or in combination, stock possessing at least fifty percent (50%) of the total combined voting power of all classes of stock entitled to vote or at least fifty percent (50%) of the total value of shares of all classes of stock of each corporation;

and more than fifty percent (50%) of the total combined voting power of all classes of stock entitled to vote or more than fifty percent (50%) of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation. This definition of a brother-sister controlled group of corporations is illustrated by the following examples:

Example (1). The outstanding stock of corporations P, Q, R, S, and T, which have only one class of stock outstanding, is owned by the following unrelated individuals:

Individuals	Corporations					Identical Ownership
	P	Q	R	S	T	
A	60%	60%	60%	60%	100%	60%
B	40%					
C		40%				-
D			40%			
E				40%		
Total	100%	100%	100%	100%	100%	100%

Corporations P, Q, R, S, and T are members of a brother-sister controlled group.

Example (2). The outstanding stock of corporations U and V, which have only one class of stock outstanding, is owned by the following unrelated individuals:

Individuals	Corporations		Identical Ownership
	U	V	
F	5%	...	...
G	10%	...	...
H	10%	...	...
I	20%	...	...
J	55%	55%	55%
K	...	10%	...
L	...	10%	...
M	...	10%	...
N	...	10%	...
O	...	5%	...
TOTAL	100%	100%	55%

Corporations U and V are members of a brother-sister controlled group because at least 50 percent of the stock of each corporation is owned by the same 5 or fewer persons.

15.4 Combined group. - The term "combined group" means any group of three or more corporations, if each corporation is a member of either a parent-subsidiary controlled group of corporations or a brother-sister controlled group of corporations, and at least one of such corporations is the common parent of a parent-subsidiary controlled group and also is a member of a brother-sister controlled group. This definition of a combined group of corporations is illustrated by the following examples:

Example (1). Smith, an individual, owns stock possessing 80 percent of the total combined voting power of all classes of the stock of corporations X and Y. Y, in turn, owns stock possessing 80 percent of the total combined voting power of all classes of the stock of corporation Z. Since --

(a) X, Y, and Z are each members of either a parent-subsidiary or

brother-sister controlled group of corporations, and

(b) Y is the common parent of a parent-subsidiary controlled group of corporations consisting of Y and Z, and also is a member of a brother-sister controlled group of corporations consisting of X and Y, X, Y, and Z are members of the same combined group.

Example (2). Assume the same facts as in example (1), and further assume that corporation X owns 80 percent of the total value of shares of all classes of stock of corporation T. X, Y, and Z, and T are members of the same combined group.

15.5 Voting power of stock. - For purposes of paragraph 3.7, in determining whether the stock owned by a person (or persons) possesses a certain percentage of the total combined voting power of all classes of stock entitled to vote of a corporation, consideration will be given to all the facts and circumstances of each case. A share of stock will generally be considered as possessing the voting power accorded to such share by the corporate charter, by-laws, or share certificate. On the other hand, if there is any agreement, whether express or implied that a shareholder will not vote his stock in a corporation, the formal voting rights possessed by his stock may be disregarded in determining the percentage of the total combined voting power possessed by the stock owned by other shareholders in the corporation, if the result is that the corporation becomes a component member of a controlled group of corporations. Moreover, if a shareholder agrees to vote his stock in a corporation in the manner specified by another shareholder in the corporation, the voting rights possessed by the stock owned by the first shareholder may be considered to be possessed by the stock owned by such other shareholder if the result is that the corporation becomes a component member of a controlled group of corporations.

15.6 Component member.

15.6.1 In general. - For purposes of West Virginia Code § 11-13C-14 and the regulations thereunder, a corporation is a component member of a controlled group of corporations on a December thirty-one (and with respect to the taxable year which includes such December thirty-one) if such corporation:

15.6.1.1 Is a member of such controlled group of corporations on the December thirty-one included in such year and is not treated as an excluded member under subparagraph 15.6.1.2, or

15.6.1.2 Is not a member of such controlled group of corporations on such December thirty-one included in such year but is treated as an additional member under paragraph 15.6.3.

15.6.2 Excluded member.

15.6.2.1 A corporation which is a member of a controlled group of corporations on December thirty-one of its taxable year shall be treated as an excluded member of such group for the taxable year including such December thirty-one if such corporation:

15.6.2.1.1 Is a member of such group for less than one-half the number of days in such taxable year which precede such December thirty-one,

15.6.2.1.2 Is exempt from federal income taxes under I.R.C. § 501(a) (except a corporation which is subject to tax on its unrelated business taxable income under I.R.C. § 511) for such taxable year,

15.6.2.1.3 Is a foreign corporation subject to federal income taxes under I.R.C. § 881 for such taxable year,

15.6.2.1.4 Is an insurance company subject to federal

income taxes under I.R.C. § 801 (other than an insurance company which is a member of a controlled group under I.R.C. § 1563(a)(4)), or

15.6.2.1.5 Is a franchised corporation, as defined in section 110-13C-15C of these regulations.

15.6.3 Additional members. - A corporation which:

15.6.3.1 Was not a member of a controlled group of corporations on the December thirty-one included within its taxable year, and

15.6.3.2 Is not described with respect to such group, in subparagraphs 15.6.2.1.2, 15.6.2.1.3, 15.6.2.1.4 or 15.6.2.1.5, or 15.6.2.2 of this subsection, shall be treated as an additional member of such group on December thirty-one, for its taxable year including such December thirty-one, if it was a member of such group for one-half (or more) of the number of days in such taxable year which precede such December thirty-one. The provisions of this subparagraph 15.6.3 may be illustrated as follows:

Example (1). Brown, an individual, owns all of the stock of corporations W and X on each day of 1990. W and X each uses the calendar year as its taxable year. On January 1, 1990, Brown also owns all the stock of corporation Y (a fiscal year corporation with a taxable year beginning on July 1, 1990 and ending on July 30, 1991), which stock he sells on October 15, 1990. On December 1, 1990, Brown purchases all the stock of corporation Z (a fiscal year corporation with a taxable year beginning on September 1, 1990, and ending on August 31, 1991). On December 31, 1990, W, X, and Z are members of the same controlled group. However, the component members of the group on such December 31 are W, X, and Y. Under subparagraph 15.6.2.1, of this paragraph, Z is treated as an excluded member of the group on December 31, 1990, since Z was a member of the group for less than one-half of the number of days (29 out of 121 days) during the period beginning on September 1, 1990 (the first day of its taxable year) and ending on December 30, 1990. Under subparagraph 15.6.3.2, Y is treated as an additional member of the group on December 31, 1990, since Y was a member of the group for at least one-half of the number of days (107 out of 183 days) during the period beginning on July 1, 1990 (the first day of its taxable year) and ending on December 30, 1990.

Example (2). On January 1, 1990, corporation P owns all the stock of corporation S, which in turn owns all the stock of corporation S-1. On November 1, 1990, P purchases all the stock of corporation X from the public and sells all of the stock of S to the public. Corporation X owns all the stock of corporation Y during 1990. P, S, S-1, X and Y file their returns on the basis of the calendar year. On December 31, 1990, P, X, and Y are members of a parent-subsidiary controlled group of corporations; also, corporations S and S-1 are members of a different parent-subsidiary controlled group of corporations; on such date. However, since X and Y have been members of the parent-subsidiary controlled group of which P is the common parent for less than one-half the number of days during the period January 1 through December 30, 1990, they are not component members of such group on such date. On the other hand, X and Y have been members of a parent-subsidiary controlled group of which X is the common parent for at least one-half the number of days during the period January 1 through December 30, 1990. Also since S and S-1 were members of the parent-subsidiary controlled group of which P is the common parent for at least one-half the number of days in the taxable years of each such corporation during the period January 1 through December 30, 1990, P, S, and S-1 are component members of such group on December 31, 1990.

Example (3). Throughout 1990, corporation M owns all the stock of corporation F which, in turn, owns all the stock of corporations L-1, L-2, X, and Y. M is a domestic mutual insurance company subject to taxation under I.R.C. § 821, F is a foreign corporation not engaged in trade or business within the United States, L-1 and L-2 are domestic life insurance companies subject to taxation under I.R.C. § 802, and X and Y are domestic corporations subject to

West Virginia corporation net income taxes. Each corporation uses the calendar year as its taxable year. On December 31, 1990, M, F, L-1, L-2, X, and Y are members of a parent-subsidiary controlled group of corporations. However, under subparagraph 15.6.2.1.4, M, F, L-1, and L-2 are treated as excluded members of the group on December 31, 1990. Thus, on December 31, 1990, the component members of the parent-subsidiary controlled group of which P is the common parent include only X and Y. Furthermore, since subparagraph 15.6.2.1.4 does not result in L-1 and L-2 being treated as excluded members of an insurance group, L-1 and L-2 are component members of an insurance group on December 31, 1990.

15.6.4 Application of constructive ownership. - For purposes of paragraphs 15.6.2 and 15.6.3, it is necessary to determine whether a corporation was a member of a controlled group of corporations for one-half (or more) of the number of days in its taxable year which precede the December 31 falling within such taxable year. Therefore, the constructive ownership rules contained in section 15B of these regulations (to the extent applicable in making such determination) must be applied on a day-by-day basis. For example, if P Corporation owns all the stock of X Corporation on each day of 1990, and on December 30, 1990, acquires an option to purchase all the stock of Y Corporation (a calendar-year taxpayer which has been in existence on each day of 1990), the application of the constructive ownership rules on a day-by-day basis results in Y being a member of the brother-sister controlled group on only one day of Y's 1990 year which precedes December 31, 1990. Accordingly, since Y is not a member of such group for one-half or more of the number of days in its 1990 year preceding December 31, 1990, Y is treated as an excluded member of such group on December 31, 1990.

15.7 Overlapping groups.

15.7.1 In general. - If on December thirty-one a corporation is a component member of a controlled group of corporations by reason of ownership of stock possessing at least fifty percent (50%) of the total value of shares of all classes of stock of the corporation, and if on such December thirty-one such corporation is also a component member of another controlled group of corporations by reason of ownership of other stock (that is stock not used to satisfy the at-least-50-percent total value test) possessing at least fifty percent (50%) of the total combined voting power of all classes of stock of the corporation entitled to vote, then such corporation shall be treated as a component member only of the controlled group of which it is a component member by reason of the ownership of at least fifty percent (50%) of the total value of its shares.

15.7.2 Brother-sister controlled groups.

15.7.2.1 If on December thirty-one, a corporation would, without application of this paragraph, be a component member of more than one brother-sister controlled group on such date, such corporation shall be treated as a component member of only one such group on such date. Such a corporation may select which group in which it is to be included by filing an election as provided in this paragraph. This election shall be in the form of a statement designating the group in which the corporation is to be included. The statement shall provide all the information with respect to stock ownership which is reasonably necessary to satisfy the Tax Commissioner that the corporation would, but for the election, be a component member of more than one controlled group. Once filed, the election is irrevocable and effective until such time that a change in the stock ownership of the corporation results in termination of membership in the controlled group in which such corporation has been included.

15.7.2.2 Except as provided in subparagraph 15.7.2.3, the statement shall be signed by a person duly authorized to act on behalf of such corporation and shall be filed on or before the due date (including extension of time) for the filing of the income tax return of such corporation of the taxable year. However, in the case of an election with respect to December 31, 1990,

the statement shall be considered as timely filed if filed on or before December 15, 1991. In the event no election is filed in accordance with the provisions of subparagraph, then the Tax Commissioner shall determine the group in which such corporation is to be included, and such determination shall be binding for all subsequent years unless the corporation files a valid election with respect to any subsequent year.

15.7.2.3 If more than one corporation would, without application of this subparagraph, be a component member of more than one controlled group, a single statement shall be signed by person duly authorized to act on behalf of each such corporation. Such statement shall designate the group in which each corporation is to be included. The statement shall be attached to the income tax return of the corporation that, among those corporations which would (without the application of this subparagraph) belong to more than one group, has the taxable year including such December thirty-one which ends on the earliest date. However, in the case of an election with respect to December 31, 1990, the statement may be filed by December 15, 1991. In the event no election is filed in accordance with the provisions of this section, then the Tax Commissioner shall determine the group in which each corporation is to be included, and such determination shall be binding for all subsequent years unless the corporations file a valid election with respect to any such subsequent year.

15.7.2.4 The provisions of this subsection may be illustrated by the following examples (in which it is assumed that all the individuals are unrelated):

Example (1). On each day of 1990 all the outstanding stock of corporations M, N, and P is held in the following manner:

Individuals	Corporations		
	M	N	P
A	60%	40%	0
B	40%	20%	40%
C	0	40%	60%

Since the more-than-50-percent stock ownership requirement is met with respect to corporations M and N and with respect to corporations N and P, but not with respect to corporations M, N, and P, corporation N would, without the application of this subparagraph, be a component member on December 31, 1990, of overlapping groups consisting of M and N and of N and P. If N does not file an election in accordance with this subsection, the Tax Commissioner will determine the group in which N is to be included.

Example (2). On each day of 1990, all the outstanding stock of corporations S, T, W, X, and Z is held in the following manner:

Individuals	Corporations				
	S	T	W	X	Z
D	60%	60%	60%	60%	60%
E	40%	0	0	0	0
F	0	40%	0	0	0
G	0	0	40%	0	0
H	0	0	0	40%	0
I	0	0	0	0	40%

On December 31, 1990, the more-than-50-percent stock ownership requirement may be met with regard to any combination of the corporations but all five corporations cannot be included as component members of a single controlled group because the inclusion of all the corporations in a single group would be dependent upon taking into account the stock ownership of more than five

persons. Therefore, if the corporations do not file a statement in accordance with subdivision 15.7.2.3, the Tax Commissioner will determine the group in which each corporation is to be included. The corporations or the Tax Commissioner, as the case may be, may designate that three corporations be included in one group and two corporations in another, or that any four corporations be included in one group and that the remaining corporation not be included in any group.

§ 110-13C-15A. Excluded stock.

15A.1 Certain stock excluded. - For purposes of West Virginia Code § 11-13C-14 and the regulations thereunder, the term "stock" does not include:

15A.1.1 Nonvoting stock which is limited and preferred as to dividends, and

15A.1.2 Treasury stock.

15A.2 Stock treated as excluded stock.

15A.2.1 Parent-subsidiary controlled group. - If a corporation (hereinafter in this paragraph referred to as "parent corporation") owns fifty percent (50%) or more of the total combined voting power of all classes of stock entitled to vote or fifty percent (50%) or more of the total value of shares of all classes of stock in another corporation (hereinafter in this paragraph referred to as "subsidiary corporation"), the provisions of subparagraph 15A.2.2 shall apply. For purposes of this subparagraph, stock owned by a corporation means stock owned directly plus stock owned with the application of the constructive ownership rules of subsections 15B.2.1 and 15B.2.4 of these regulations, relating to options and attribution from corporations. In determining whether the stock owned by a corporation possesses the requisite percentage of the total combined voting power of all classes of stock entitled to vote of another corporation, see subparagraph 15.1.6 of these regulations.

15A.2.2 Stock treated as not outstanding. - If the provisions of this subparagraph apply, then for purposes of determining whether the parent corporation or the subsidiary corporation is a member of a parent-subsidiary controlled group of corporations within the meaning of subparagraph 15.1.2, the following stock of the subsidiary corporation shall, except as otherwise provided in paragraph 15A.3 of this section, be treated as if it were not outstanding:

15A.2.2.1 Plan of deferred compensation. - Stock in the subsidiary corporation held by a trust which is part of a plan of deferred compensation for the benefit of the employees of the parent corporation or the subsidiary corporation. The term "plan of deferred compensation" shall have the same meaning such term has in I.R.C. § 406(a)(3) and the regulations thereunder.

15A.2.2.2 Principal stockholders and officers. - Stock in the subsidiary corporation owned (directly and with the application of the rules contained in subsection 15B.2 of these regulations) by an individual who is a principal stockholder or officer of the parent corporation. A principal stockholder of the parent corporation is an individual who owns (directly and with the application of the rules contained in subsection 15B.2) five percent or more of the total combined voting power of all classes of stock entitled to vote or five percent for more of the total value of share of all classes of stock of the parent corporation. An officer of the parent corporation includes the president, vice-presidents, general manager, treasurer, secretary, and comptroller of such corporation, and any other person who performs duties corresponding to those normally performed by persons occupying such positions.

15A.2.2.3 Employees. - Stock in the subsidiary corporation owned (directly and with the application of the rules contained in subsection 15B.2 of these regulations) by an employee of the subsidiary corporation if such stock is

subject to conditions which substantially restrict or limit the employee's right (or if the employee constructively owns such stock, the direct owner's right) to dispose of such stock and which run in favor of the parent or subsidiary corporation. In general, any condition which extends, directly or indirectly, to the parent corporation or the subsidiary corporation preferential rights with respect to the acquisition of the employee's (or direct owner's) stock will be considered to be a condition described in the preceding sentence. It is not necessary, in order for a condition to be considered to be in favor of the parent corporation or the subsidiary corporation, that the parent or subsidiary be extended a discriminatory concession with respect to the price of the stock. For example, a condition whereby the parent corporation is given a right of first refusal with respect to any stock of the subsidiary corporation offered by an employee for sale is a condition which substantially restricts or limits the employee's right to dispose of such stock and runs in favor of the parent corporation. Moreover, any legally enforceable condition which prohibits the employee from disposing of his stock without the consent of the parent (or a subsidiary of the parent) will be considered to be a substantial limitation running in favor of the parent corporation.

15A.2.2.4 Controlled exempt organization. - Stock in the subsidiary corporation owned (directly and with the application of the rules contained in subsection 15B.2 by an organization (other than the parent corporation) --

15A.2.2.4a To which I.R.C. § 501 (relating to certain educational and charitable organizations which are exempt from tax) applies, and

15A.2.2.4b Which is controlled directly or indirectly by the parent corporation or subsidiary corporation, by an individual, estate, or trust that is a principal stockholder of the parent corporation, by an officer of the parent corporation, or by any combination thereof. The terms "principal stockholder of the parent corporation" and "officer of the parent corporation" shall have the same meanings as in subsection 15A.2.2.2 of this subparagraph. The term "control" as used in this clause means control in fact and the determination of whether the control requirement of this clause is met will depend upon all the facts and circumstances of each case; without regard to whether such control is legally enforceable and irrespective of the method by which such control is exercised or excisable.

15A.2.3 Brother-sister controlled group. - If five or fewer persons (hereinafter referred to as common owners) who are individuals, estates, or trusts own (directly and with the application of the rules contained in subsection 15B.2 of these regulations) stock possessing fifty percent (50%) or more of the total combined voting power of all classes of stock entitled to vote or fifty percent (50%) or more of the total value of shares of all classes of stock in a corporation, the provisions of subparagraph 15A.2.4 of this subsection shall apply. In determining whether the stock owned by such person or persons possesses the requisite percentage of the total combined voting power of all classes of stock entitled to vote of a corporation, *see* paragraph 15.1.6 of these regulations.

15A.2.4 Stock treated as not outstanding. - If the provisions of this subparagraph apply, then for purposes of determining whether a corporation is a member of a brother-sister controlled group of corporations within the meaning of paragraph 15.1.3 of these regulations, the following stock of such corporation shall, except as otherwise provided in subsection 15A.3 of this section, be treated as if it were not outstanding:

15A.2.4.1 Exempt employees' trust. - Stock in such corporation held by an employees' trust described in I.R.C. § 401(a) which is exempt from tax under I.R.C. 501(a), if such trust is for the benefit of the employees of such corporation.

15A.2.4.2 Employees. - Stock in such corporation owned (directly

and with the application of the rules contained in subsection 15B.2 of these regulations) by an employee of such corporation if such stock is subject to conditions which run in favor of a common owner of such corporation (or in favor of such corporation) and which substantially restrict or limit the employee's right (or if the employee constructively owns such stock, the record owner's right) to dispose of such stock. The principles of subparagraph 15A.2.2.3 of this paragraph shall apply in determining whether a condition satisfies the requirements of the preceding sentence. Thus, in general, a condition which extends, directly or indirectly, to a common owner or such corporation preferential rights with respect to the acquisition of the employee's (or record owner's) stock will be considered to be a condition which satisfies such requirements. For purposes of this subdivision, if a condition which restricts or limits an employee's right (or record owner's right) to dispose of his stock also applies to the stock in such corporation held by such common owner pursuant to a bona fide reciprocal stock purchase arrangement, such condition shall not be treated as one which restricts or limits the employee's (or record owner's) right to dispose of such stock. An example of a reciprocal stock purchase arrangement is an agreement whereby a common owner and the employee are given a right of first refusal with respect to stock of the employer corporation owned by the employee in the event that the corporation should discharge the employee for reasonable cause, the purchase arrangement would not be reciprocal within the meaning of this subdivision.

15A.2.4.3 Controlled exempt organization. - Stock in such corporation owned (directly and with the application of the rules contained in subsection 15B.2 of these regulations) by an organization --

15A.2.4.3a To which I.R.C. § 501(c)(3) (relating to certain educational and charitable organizations which are exempt from tax) applies, and

15A.2.4.3b Which is controlled directly or indirectly by such corporation, by an individual, estate, or trust that is a principal stockholder of such corporation, by an officer of such corporation, or by any combination thereof. The terms "principal stockholder" and "officer" shall have the same meanings in this subdivision as in subparagraph 15A.2.4.2.2. The term "control" as used in this subdivision means control in fact and the determination of whether the control requirement of 15A.2.4b of this subdivision is met will depend upon all the facts and circumstances of each case, without regard to whether such control is legally enforceable and irrespective of the method by which such control is exercised or exercisable.

15A.2.5 Other controlled groups. - The provisions of paragraphs 15A.2.1 through 15A.2.4 of this subsection shall apply in determining whether a corporation is a member of a combined group (within the meaning of paragraph 15.1.4 of these regulations or an insurance group (within the meaning of paragraph 15.1.5). For example, under paragraph 15.1.4 in order for a corporation to be a member of a combined group such corporation must be a member of a parent-subsidiary group or a brother-sister group. Accordingly, the excluded stock rules provided by this paragraph are applicable in determining whether the corporation is a member of such group.

15A.2.6 Meaning of employee. - For purposes of this section, and sections 110-13C-15B and 110-13C-15C of these regulations, the term "employee" has the same meaning such term is given in I.R.C. § 3306(i) (relating to definitions for purposes of the Federal unemployment Tax Act). Accordingly, the term employee as used in such sections includes an officer of a corporation.

15A.2.7 Examples. - The provisions of this paragraph subsection 15A.2 may be illustrated by the following examples:

Example (1). Corporation P owns 70 of the 100 shares of the only class of stock of Corporation S. The remaining shares of S are owned as follows: 4 shares by Jones (the general manager of P), and 26 shares by Smith (who also

owns 5 percent of the total combined voting power of the stock of P). P satisfies the fifty percent stock ownership requirement of subparagraph (1) of this paragraph with respect to S. Since Jones is an officer of P and Smith is a principal stockholder of P, under subparagraph 15A.2.2.2, the S stock owned by Jones and Smith is treated as not outstanding for purposes of determining whether P and S are members of a parent-subsidiary controlled group of corporations within the meaning of paragraph 15.1.2 of section 110-13C-15 of these regulations. Thus, P is considered to own stock possessing 100 percent (70+70) of the total voting power and value of all the S stock. Accordingly, P and S are members of a parent-subsidiary controlled group of corporations.

Example (2). Assume the same facts as in example (1) and further assume that Jones owns 15 shares of the 100 shares of the only class of stock of corporation S-1, and corporation S owns 75 shares of such stock. P satisfies the fifty percent stock ownership requirement of subparagraph (1) of this paragraph with respect to S-1 since P is considered as owning 52.5 percent (70 percent x 75 percent) of the S-1 stock with the application of paragraph (b)(4) of § 1.1563.3. Since Jones is an officer of P, under subparagraph 15A.2.2.2, the S-1 stock owned by Jones is treated as not outstanding for purposes of determining whether S-1 is a member of the parent-subsidiary controlled group of corporations. Thus, S is considered to own stock possessing 88.2 percent (75+85) of the voting power and value of the S-1 stock. Accordingly, P, S, and S-1 are members of a parent-subsidiary controlled group of corporations.

Example (3). Corporation X owns 60 percent of the only class of stock of corporation Y. Davis, the president of Y, owns, the remaining 40 percent of the stock of Y. Davis has agreed that if he offers his stock in Y for sale he will first offer the stock to X at a price equal to the fair market value of the stock on the first date the stock is offered for sale. Since Davis is an employee of Y within the meaning of I.R.C. § 3306(i), and his stock in Y is subject to a condition which substantially restricts or limits his right to dispose of such stock and runs in favor of X, under subparagraph 15A.2.2.3, such stock is treated as if it were not outstanding of purposes of determining whether X and Y are members of a parent-subsidiary controlled group of corporations. The result would be the same if Davis's wife, instead of Davis, owned directly the 40 percent stock interest in Y and such stock was subject to a right of first refusal running in favor of X.

15A.3 Exemption.

15A.3.1 General. - If stock of a corporation is owned by a person directly or with the application of the rules contained in section 110-13C-15B.2 of these regulations, and such ownership results in the corporation being a component member of a controlled group of corporations on a December thirty-one, then the stock shall not be treated as excluded stock under the provisions of subsection 15A.2 of this section if the result of applying such provisions is that such corporation is not a component member of a controlled group of corporations on such December thirty-one.

15A.3.2 Illustration. - The provisions of this paragraph may be illustrated by the following example:

Example. On each day of 1990, corporation P owns directly 50 of the 100 shares of the only class of stock of corporation S. Jones, an officer of P, owns directly 30 shares of S stock and P has an option to acquire such 30 shares of S stock owned directly by Jones is treated as not outstanding, the result is that P would be treated as owning stock possessing only 71 percent (50÷70) of the total voting power and value of S stock, and S would not be a component member of a controlled group of corporations on December 31, 1965. However, since P is considered as owning the 30 shares of S stock with the application of paragraph 110-13C-15B.2.1 of these regulations, and such ownership plus the S stock directly owned by P (50 shares) results in S being a component member of a controlled group of corporations on December 31, 1965, the provisions of this paragraph apply. Therefore, the provisions of paragraph 15A.2.2.2 of this

section do not apply with respect to the 30 shares of S stock, and on December 31, 1990, S is a component member of a controlled group of corporations consisting of P and S.

§ 110-13C-15B. **Rules for determining stock ownership.**

15B.1 In general. - In determining stock ownership for purposes of Section 110-13C-15 of these regulations, and this section, the constructive ownership rules of subsection 15B.2 of this section apply to the extent such rules are referred to in such sections. The application of such rules shall be subject to the operating rules and special rules contained in subsection 15B.3 and 15B.4 of this section.

15B.2 Constructive ownership.

15B.2.1 Options. - If a person has an option to acquire any outstanding stock of a corporation, such stock shall be considered as owned by such person. For purposes of this subsection, an option to acquire such an option, and each one of a series of such options, shall be considered as an option to acquire such stock. For example, assume Smith owns an option to purchase one hundred (100) shares of the outstanding stock of M Corporation. Under this subsection, Smith is considered to own such one hundred (100) shares. The result would be the same if Smith owned an option to acquire the option (or one of a series of options) to purchase 100 shares of M stock.

15B.2.2 Attribution from partnerships.

15B.2.2.1 Stock owned, directly or indirectly, by or for a partnership shall be considered as owned by any partner having an interest of five percent (5%) or more in either the capital or profits of the partnership in proportion to his interest in capital or profits, whichever such proportion is the greater.

15B.2.2.2 The provisions of this subsection may be illustrated by the following example:

Example: Green, Jones, and White, unrelated individuals, are partners in the GJW partnership. The partners' interests in the capital and profits of the partnership are as follows:

Partner	Capital	Profits
Green	36%	25%
Jones	50%	71%
White	4%	4%

The GJW partnership owns the entire outstanding stock (100 shares) of X Corporation. Under this subparagraph, Green is considered to own the X stock owned by the partnership in proportion to his interest in capital (36%) or profits (25%), whichever such proportion is the greater. Therefore, Green is considered to own 36 shares of the X stock. However, since Jones has a greater interest in the profits of the partnership, he is considered to own the X stock in proportion to his interest in such profits. Therefore, Jones is considered to own 71 shares of the X stock. Since White does not have an interest of 5% or more in either the capital or profits of the partnership, he is not considered to own any shares of the X stock.

15B.2.3 Attribution from estates or trusts.

15B.2.3.1 Stock owned, directly or indirectly, by or for an estate or trust shall be considered as owned by any beneficiary who has an actuarial interest of five percent (5%) or more in such stock, to the extent of such actuarial interest. For purposes of this subsection, the actuarial interest of each beneficiary shall be determined by assuming the maximum

exercise of discretion by the fiduciary in favor of such beneficiary and the maximum exercise of discretion by the fiduciary in favor of such beneficiary and the maximum use of such stock to satisfy his rights as a beneficiary. A beneficiary of an estate or trust who cannot under any circumstances receive any interest in stock held by the estate or trust, including the proceeds from the disposition thereof, or the income therefrom, does not have an actuarial interest in such stock. Thus, where stock owned by a decedent's estate has been specifically bequeathed to certain beneficiaries and the remainder of the estate is bequeathed to other beneficiaries, the stock is attributable only to the beneficiaries to whom it is specifically bequeathed. Similarly, a remainderman of a trust who cannot under any circumstances receive any interest in the stock of a corporation which is a part of the corpus of the trust (including any accumulated income therefrom or the proceeds from a disposition thereof) does not have an actuarial interest in such stock. However, an income beneficiary of a trust does have an actuarial interest in stock if he has any right to the income from such stock even though under the terms of the trust instrument such stock can never be distributed to him. The factors and methods prescribed for use in ascertaining the value of an interest in property for federal estate tax purposes shall be used for purposes of this subdivision in determining a beneficiary's actuarial interest in stock owned directly or indirectly by or for a trust.

15B.2.3.2 For the purposes of this subsection, property of a decedent shall be considered as owned by his estate if such property is subject to administration by the executor or administrator for the purposes of paying claims against the estate and expenses of administration notwithstanding that, under local law, legal title to such property vests in the decedent's heirs, legatees, or devisees immediately upon death. With respect to an estate, the term "Beneficiary" includes any person entitled to receive property of the decedent pursuant to a will or pursuant to laws of descent and distribution. A person shall no longer be considered a beneficiary of an estate when all the property to which the beneficiary is entitled has been received by such person, when the beneficiary no longer has a claim against the estate arising out of having been a beneficiary, and when there is only a remote possibility that it will be necessary for the estate to seek the return of property or to seek payment from the beneficiary by contribution or otherwise to satisfy claims against the estate or expenses of administration. When pursuant to the preceding sentence, a person ceases to be a beneficiary, stock owned by the estate shall not thereafter be considered owned by the beneficiary.

15B.2.3.3 Stock owned, directly or indirectly, by or for any portion of a trust of which a person is considered the owner under subpart E, part I, subchapter J of the Internal Revenue Code (relating to grantors and others treated as substantial owners) is considered as owned by such person.

15B.2.3.4 This subsection does not apply to stock owned by any employees' trust described in Internal Revenue Code § 401(a) which is exempt from tax under Internal Revenue Code § 501(a).

15B.2.4 <u>Attribution from corporations</u>.

15B.2.4.1 Stock owned, directly or indirectly, by or for a corporation shall be considered as owned by any person who owns (within the meaning of Section 110-13C-15.4 of these regulations five percent 5%) or more in value of its stock in that proportion which the value of the stock which such person so owns bears to the value of all the stock in such corporation.

15B.2.4.2 The provisions of this subparagraph may be illustrated by the following example:

<u>Example</u>: Brown, an individual, owns 60 shares of the 100 shares of the only class of outstanding stock of corporation P. Smith, an individual, owns 4 shares of the P stock, and corporation X owns 36 shares of the P stock. Corporation P owns, directly and indirectly, 50 shares of the stock of

Corporation S. Under this subsection, Brown is considered to own 30 shares of the S stock (60/100 X 50), and X is considered to own 18 shares of the S stock (36/100 X 50).

Since Smith does not own five percent (5%) or more in value of the P stock, he is not considered as owning any of the S stock owned by P. If, in this example, Smith's wife had owned directly 1 share of the P stock, Smith (and his wife) would each own 5 shares of the P stock, and therefore Smith (and his wife) would be considered as owning 2.5 shares of the S stock (5/100 X 50).

15B.2.5 Spouse.

15B.2.5.1 Except as provided in subparagraph 15B.2.5.2 of this section, an individual shall be considered to own the stock owned, directly or indirectly, by or for his spouse, other than a spouse who is legally separated from the individual under a decree of divorce, whether interlocutory or final, or a decree of separate maintenance.

15B.2.5.2 An individual shall not be considered to own stock in a corporation owned, directly or indirectly, by or for his spouse on any day of a taxable year of such corporation, provided that each of the following conditions are satisfied with respect to such taxable year:

15B.2.5.2.a Such individual does not, at any time during such taxable year, own directly any stock in such corporation.

15B.2.5.2.b Such individual is not a member of the board of directors or an employee of such corporation and does not participate in the management of such corporation at any time during such taxable years.

15B.2.5.2.c Not more than fifty percent (50%) of such corporation's gross income for such taxable year was derived from royalties, rents, dividends, interest, and annuities.

15B.2.5.2.d Such stock in such corporation is not, at any time during such taxable year, subject to conditions which substantially restrict or limit the spouse's right to dispose of such stock and which run in favor of the individual or his children who have not attained the age of twenty-one (21) years. The principles of subsection 15A.2.2.3 of these regulations shall apply in determining whether a condition is a condition described in the preceding sentence.

15B.2.5.3 For purposes of subparagraph 15B.2.5.2 of this section, the gross income of a corporation for a taxable year shall be determined under I.R.C. § 61 and the regulations thereunder. The terms "royalties," "rents," "dividends," "interest," and "annuities" shall have the same meanings such terms are given for purposes of I.R.C. § 1244(c).

15B.2.6 Children, grandchildren, parents, and grandparents.

15B.2.6.1 An individual shall be considered to own the stock owned, directly or indirectly, by or for his children who have not attained the age of twenty-one (21) years, and, if the individual has not attained the age of twenty-one (21) years, the stock owned, directly or indirectly, by or for his parents.

15B.2.6.2 If an individual owns (directly, and with the application of the rules of this section but without regard to this subsection) stock possessing more than fifty percent (50%) of the total combined voting power of all classes of stock entitled to vote or more than fifty percent (50%) of the total value of shares of all classes of stock in a corporation, then such individual shall be considered to own the stock in such corporation owned, directly or indirectly, by or for his parents, grandparents, and children who have attained the age of twenty-one (21) years. In determining whether the

stock owned by an individual possesses the requisite percentage of the total combined voting power of all classes of stock entitled to vote of a corporation.

15B.2.6.3 For purposes of West Virginia Code § 11-13C-14 and Sections 110-13C-15 through 110-13C-15C of these regulations, a legally adopted child of an individual shall be treated as a child of such individual by blood.

15B.2.6.4 The provisions of this paragraph may be illustrated by the following example:

Example: (a) Facts. - Individual F owns directly 40 shares of the 100 shares of the only class of stock of Z Corporation. His son, M (20 years of age), owns directly 30 shares of such stock, and his son, A (30 years of age), owns directly 20 shares of such stock. The remaining 10 shares of the Z stock are owned by an unrelated person.

(b) F's ownership. - Individual F owns 40 shares of the Z stock directly and is considered to own the 30 shares of Z stock owned directly by M. Since, for purposes of the more-than-50% stock ownership test contained in subsection 15B.2.6.2, F is treated as owning 70 shares of 70% of the total voting power and value of the Z stock, he is also considered as owning the 20 shares owned by his adult son, A. Accordingly, F is considered as owning a total of 90 shares of the Z stock.

(c) M's ownership. - Minor son, M, owns 30 shares of the Z stock directly, and is considered to own the 40 shares of Z stock owned directly by his father, F. However, M is not considered to own the 20 shares of Z stock owned directly by his brother, A, and constructively by F, because stock constructively owned by F by reason of family attribution is not considered as owned by him for purposes of making another member of his family the constructive owner of such stock. See Section 15B.3.2 of these regulations. Accordingly, M owns and is considered as owning a total of 70 shares of the Z stock.

(d) A's ownership. - Adult son, A, owns 20 shares of the Z stock directly. Since, for purposes of the more-than-50% stock ownership test contained in subsection 15B.2.6.2 of this section, A is treated as owning only the Z stock which he owns directly, he does not satisfy the condition precedent for the attribution of Z stock from his father. Accordingly, A is treated as owning only the 20 shares of Z stock which he owns directly.

15B.3 Operating rules and special rules.

15B.3.1 In general. - Except as provided in paragraph 15B.3.2 of this section, stock constructively owned by a person by reason of the application of paragraphs 15B.2.1 through 15B.2.6 of this section shall, for purposes of applying such paragraphs, be treated as actually owned by such person.

15B.3.2 Members of family. - Stock constructively owned by an individual by reason of the application of paragraphs 15B.2.5 or 15B.2.6 of this section shall not be treated as owned by him for purposes of again applying such subsections in order to make another the constructive owner of such stock.

15B.3.3 Precedence of option attribution. - For purposes of this section, if stock may be considered as owned by a person under paragraph 15B.2.1 of this section (relating to option attribution) and under any other paragraph of such section, such stock shall be considered as owned by such person under subsection 15B.3.1 of such paragraph.

15B.3.4 Examples. - The provisions of this paragraph may be illustrated by the following examples:

Example (1): A, 30 years of age, has a 90% interest in the capital and profits of a partnership. The partnership owns all the outstanding stock of

corporation X and X owns 60 shares of the 100 outstanding shares of corporation Y. Under paragraph 15B.3.1 of this section, the 60 shares of Y constructively owned by the partnership by reason of paragraph 15B.2.4 of this section is treated as actually owned by the partnership for purposes of applying paragraph 15B.3.2 of these regulations. Therefore, A is considered as owning 54 shares of the Y stock (90% of 60 shares).

Example (2): Assume the same facts as in Example (1). Assume further that B, who is 20 years of age and the brother of A, directly owns 40 shares of Y stock. Although the stock of Y owned by B is considered as owned by C (the father of A and B) under subparagraph 15B.2.6.1 of this section, under paragraph 15B.3.2 of this section such stock may not be treated as owned by C for purposes of applying subparagraph 15B.2.6.2 of this section in order to make A the constructive owner of such stock.

Example (3): Assume the same facts assumed for purposes of Example (2), and further assume that C has an option to acquire the 40 shares of Y stock owned by his son, B. The rule contained in subparagraph (2) of this paragraph does not prevent the reattribution of such 40 shares to A because, under subparagraph (3) of this paragraph, C is considered as owning the 40 shares by reason of option attribution and not by reason of family attribution. Therefore, since A satisfies the more-than-50% stock ownership test contained in paragraph 15B.2.6.2 of this section with respect to Y, the 40 shares of Y stock constructively owned by C are reattributed to A, and A is considered as owning a total of 94 shares of Y stock.

15B.4 Special rule.

15B.4.1 In general. - If the same stock of a corporation is owned by two (2) or more persons, then such stock shall be treated as owned by the person whose ownership of such stock results in the corporation being a component member of a controlled group on a December thirty-one which has at least one (1) other component member on such date.

15B.4.2 Component member of more than one (1) group.

15B.4.2.1 If, by reason of paragraph 15B.4.1 of this section, a corporation would (but for this subsection) become a component member of more than one (1) controlled group on a December thirty-one, such corporation shall be treated as a component member of only one (1) such controlled group on such date. The determination as to which group such corporation is treated as a component member of shall be made in accordance with the rules contained in subparagraphs 15B.4.2.2, 15B.4.2.3 and 15B.4.2.4 of this section.

15B.4.2.2 In any case in which a corporation is a component member of a controlled group of corporations on a December thirty-one as a result of treating each share of its stock as owned only by the person who owns such share directly, then each such share shall be treated as owned by the person who owns such share directly.

15B.4.2.3 If the application of subparagraph 15B.4.2.2 of this section does not result in a corporation being treated as a component member of only one (1) controlled group on a December thirty-one, then the stock of such corporation described in paragraph 15B.4.1 of this section shall be treated as owned by the one person described in such paragraph who owns, directly and with the application of the rules contained in paragraphs 15B.2.1, 15B.2.2, 15B.2.3, and 15B.2.4 of this section, the stock possessing the greatest percentage of the total value of shares of all classes of stock of the corporation.

15B.4.2.4 If the application of subparagraphs 15B.4.2.2 or 15B.4.2.3 of this section does not result in a corporation being treated as a component member of only one (1) controlled group of corporations on a December thirty-one, then the determination of that group of which such corporation is to be treated as a component member shall be made by the Tax Commissioner unless

such corporation files an election as provided in this subsection. The election shall be in the form of a statement, signed by a person authorized to act on behalf of such corporation, designating the group in which the corporation has elected to be included. The statement shall provide all the information with respect to stock ownership which is reasonably necessary to satisfy the district director that the corporation would, but for the election, be a component member of more than one (1) controlled group. The statement shall be filed on or before the due date (including extensions of time) for the filing of the income tax return of such corporation for the taxable year. However, in the case of an election with respect to December 31, 1990, the statement shall be considered as timely filed if filed on or before December 15, 1991. Once filed, the election is irrevocable and effective until subparagraph 15B.2.5.2 or subparagraph 15B.2.5.3 of these regulations apply or until there is a substantial change in the stock ownership of such corporation.

15B.4.3 Examples. - The provisions of this section may be illustrated by the following examples, in which each corporation referred to uses the calendar year as its taxable year and the stated facts are assumed to exist on each day of 1990 (unless otherwise provided in the example):

Example 1: Jones owns all the stock of corporation X and has an option to purchase from Smith all the outstanding stock of corporation Y. Smith owns all the outstanding stock of corporation Z. Since the Y stock is considered as owned by two (2) or more persons, under subparagraph 15B.3.2.2 of this section, the Y stock is treated as owned only by Smith since he has direct ownership of such stock. Therefore, on December 31, 1990, Y and Z are component members of the same brother-sister controlled group. If, however, Smith had owned his stock in corporation Z for less than one-half (1/2) of the number of days of Z's 1990 taxable year, then under paragraph 15B.3.1 of this section the Y stock would be treated as owned only by Jones since his ownership results in Y being a component member of a controlled group on December 31, 1990.

Example 2: Individual H owns directly all the outstanding stock of corporation M. W (the wife of H) owns directly all the outstanding stock of corporation N. Neither spouse is considered as owning the stock directly owned by the other because each of the conditions prescribed in subparagraph 15B.2.5.2 of this section is satisfied with respect to each corporation's 1990 taxable year. H owns directly 60% of the only class of stock of corporation P and W owns the remaining 40% of the P stock. Under subparagraph 15B.4.2.3 of this section, the stock of P is treated as owned only by H since H owns (directly and with the application of the rules contained in paragraphs 15B.2.1, 15B.2.2, 15B.2.3, and 15B.2.4 of this section) the stock possessing the greatest percentage of the total value of shares of all classes of stock of P. Accordingly, on December 31, 1990, P is treated as a component member of a brother-sister group consisting of M and P.

Example 3: Unrelated individuals A and B each owns one-half (1/2) of all the outstanding stock of corporation R, which in turn owns 70% of the only class of outstanding stock of corporation S. The remaining 30% of the stock of corporation S is owned by unrelated individual C. Under the attribution rule of subsection 15B.2.4 of this section, A and B each is considered as owning 35% of the stock of corporation S. Accordingly, since 5 or fewer persons own at least 80% of the stock of corporations R and S and also own more than 50% identically (A and B's identical ownership each is 35%), on December 31, 1990, corporations R and S are treated as component members of the same brother-sister controlled group.

§ 110-13C-15C. Franchised corporations.

15C.1 In general. - For purposes of subparagraph 15.2.2.4 of these regulations, a member of a controlled group of corporations shall be considered to be a franchised corporation for a taxable year if each of the following conditions is satisfied for one-half (1/2) (or more) of the number of days preceding the December thirty-one included within such taxable year (or, if such

taxable year does not include a December thirty-one, for one-half (1/2) or more of the number of days in such taxable year preceding the last day of such year):

15C.1.1 Such member is franchised to sell the products of another member, or the common owner, of such controlled group.

15C.1.2 More than fifty percent (50%) (determined on the basis of cost) of all the goods held by such member primarily for sale to its customers are acquired from members or the common owner of the controlled group, or both.

15C.1.3 The stock of such member is to be sold to an employee (or employees) of such member pursuant to a bona fide plan designed to eliminate the stock ownership of the parent corporation (as defined in Section 110-13C-15A.2.1 of these regulations) or of the common owner (as defined in Section 110-13C-15A.2.3 of these regulations) in such member.

15C.1.4 Such employee owns (or such employees in the aggregate own) directly more than twenty percent (20%) of the total value of shares of all classes of stock of such member. For purposes of this subsection, the determination of whether an employee (or employees) owns the requisite percentage of the total value of the stock of the member shall be made without regard to Section 110-13C-15B.2 of these regulations, relating to certain stock treated as excluded stock. Furthermore, if the corporation has more than one (1) class of stock outstanding, the relative voting rights as between each such class of stock shall be disregarded in making such determination.

15C.2 Plan for elimination of stock ownership.

15C.2.1 A plan referred to in paragraph 15C.1.3 of this section must:

15C.2.1.1 Provide a reasonable selling price for the stock of the member, and

15C.2.1.2 Require that a portion of the employee's compensation or dividends, or both, from such member be applied to the purchase of such stock (or to the purchase of notes, bonds, debentures, or similar evidences of indebtedness of such member held by the parent corporation or the common owner).

It is not necessary, in order to satisfy the requirements of subparagraph 15C.2.1.2 of this section, that the plan require that a percentage of every dollar of the compensation and dividends be applied to the purchase of the stock (or the indebtedness). The requirements of such subsection are satisfied if an otherwise qualified plan provides that under certain specified conditions (such as a requirement that the member earn a specified profit) no portion of the compensation and/or dividends need be applied to the purchase of the stock (or indebtedness), provided such conditions are reasonable.

15C.2.2 A plan for the elimination of the stock ownership of the parent corporation or of the common owner will satisfy the requirements of paragraphs 15C.1.3 and 15C.2.1 of this section even though it does not require that the stock of the member be sold to an employee (or employees) if it provides for the redemption of the stock of the member held by the parent or common owner and under the plan the amount of such stock to be redeemed during any period is calculated by reference to the profits of such member during such period.

KEN HECHLER
Secretary of State

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August 11, 1993

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: State Tax Division

RULE: Amendments, Series 13C, Business Investment and Jobs Expansions Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Tax Credit

DATE FILED AS AN EMERGENCY RULE: July 9, 1993

DECISION NO. 11-93

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved. A copy of the complete decision with required findings is available from this office.

KEN HECHLER
Secretary of State

FILED
Aug 11 4 16 PM '93
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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Secretary of State

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DECISION EMERGENCY RULE DECISION
(ERD 11-93)

AGENCY: State Tax Division
RULE: Amendments, Series 13C, Business Investment and Jobs Expansion Tax Credit, Small Business Tax Credit, Corporate Headquarters Relocation Tax Credit
FILED AS AN EMERGENCY RULE: July 9, 1993

par. 1 The State Tax Division (Division) has filed the above amendments to an existing rule as an emergency rule.

par. 2 West Virginia Code 29A-3-a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.

par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [(29A-3-a(a)].

par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the thirty-five day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The Division filed this emergency rule with supporting documents with the Secretary of State July 9, 1993 and with the LRMRC July 9, 1993.

par. 7 It is the determination of the Secretary of State that the Division has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- WV Code §11-13C-5(j) reads in part:

In order to effectuate the purposes of this subsection, the commissioner shall propose for promulgation legislative rules in accordance with §29A-3-1 et seq. of this code: Provided, That the initial promulgation may be by emergency rule. The rule shall set forth the standards by which this subsection will be implemented and enforced: Provided, however, That with regard to investment placed in service prior to the passage of this provision, taxpayers having a specific written determination from the tax commissioner that the taxpayer is authorized or required to take credit against tax not attributable to qualified investment shall not be subject to the alternative allocation of credit provided for under this subsection.

par. 9 It is the determination of the Secretary of State that the Division has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- WV Code 29A-3-15(g) defines "emergency" as follows:

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

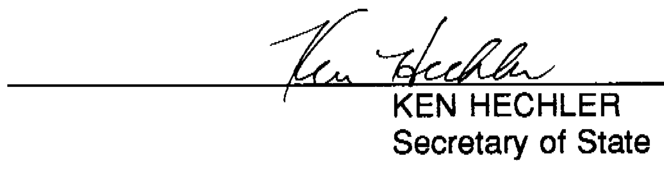
par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Division are as follows:

The Legislature when it enacted S.B. 463 amended W. Va. Code §11-13C-5 to apply to tax years beginning after December 31, 1992, such amendment requiring the Tax Commissioner to promulgate legislative rules which require an alternative method of determining tax in certain situations. This rule provides necessary clarification of the alternative method. Because the statute is applicable to all tax years beginning after December 31, 1992 and involves considerable technical complexity, it is necessary for this rule to be effective in 1993, thereby avoiding confusion and preventing substantial harm to the public interest.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(g). . . mandated by the Legislature, and to prevent substantial harm to the public interest.

par. 14 This decision shall be cited as Emergency Rule Decision 11-93 or ERD 11-93 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the State Tax Division, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER
Secretary of State

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