

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #7

Do not mark in this box  
Filing Date

FILED

2008 JUL 31 AM 10: 01

OFFICE WEST VIRGINIA  
SECRETARY OF STATE  
Effective Date

**NOTICE OF AN EMERGENCY RULE**

AGENCY: State Tax Department TITLE NUMBER: 110

CITE AUTHORITY W. Va. Code §§11-13X-9, 11-10-5, 11-10-5d(f)

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES \_\_\_\_\_ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

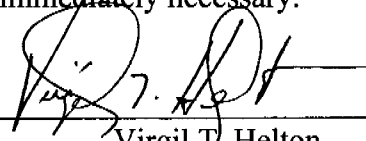
IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: 13X

TITLE OF RULE BEING PROPOSED: West Virginia Film Industry Investment Act

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

The Film Industry Investment Act tax credit is currently in effect, and the Film Office and project review committee are currently evaluating projects for tax credit certification. Emergency rules providing structure and procedures for this process and administration of the credit are immediately necessary.



Virgil T. Helton

Secretary of the Department of Revenue

Use additional sheets if necessary

Summary for 110-13X

The proposed rule sets forth guidance on the tax credit authorized by the Film Industry Investment Act, West Virginia Code §11-13X-1 *et seq.*

**110 C.S.R. 13X**  
**FILM INDUSTRY INVESTMENT TAX CREDIT**  
**STATEMENT OF CIRCUMSTANCES**

The West Virginia State Legislature authorized a tax credit for certain taxpayers in West Virginia Code §11-13X-1 *et seq*, known as the Film Industry Investment Act. The proposed legislative rule sets forth the application of the credit and procedures for the transfer, sale, or assignment of such credits.

APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: Film Industry Investment Tax Credit (110 CSR 13X)

Type of Rule:  Legislative  Interpretive  Procedural

Agency: State Tax Department

Address: 1001 Lee Street  
Charleston, WV 25301

Phone Number: (304) 558-5330 Email: \_\_\_\_\_

**Fiscal Note Summary**

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The rule, as written, provides clarification of the application of the Film Industry Investment Tax Credit to selected taxes and of the transfer or sale of unused credit. Since the rule does not alter the amount of Film Industry Investment Tax Credit available, approval of the rule will have no impact on State costs and revenue.

**Fiscal Note Detail**

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	\$0	\$0	\$0
Personal Services	\$0	\$0	\$0
Current Expenses	\$0	\$0	\$0
Repairs & Alterations	\$0	\$0	\$0
Assets	\$0	\$0	\$0
Other	\$0	\$0	\$0
2. Estimated Total Revenues	\$0	\$0	\$0

Rule Title: Film Industry Investment Tax Credit (110 CSR 13X)

**3. Explanation of above estimates (including long-range effect):**

Please include any increase or decrease in fees in your estimated total revenues:

Approval of this proposed rule will not increase or decrease revenue or costs.

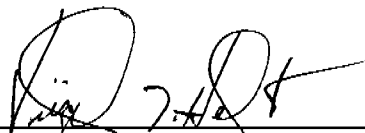
**MEMORANDUM**

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

The intent of this proposed rule is to provide clarification of the application of the Film Industry Investment Tax Credit to selected taxes and of the transfer or sale of unused credit. Since the amount of Film Industry Investment Tax Credit will not change, there is no net fiscal impact.

Date: \_\_\_\_\_

Signature of Agency Head or Authorized Representative:



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Virgil T. Helton, Cabinet Secretary  
West Virginia Department of Revenue

TITLE 110  
EMERGENCY RULE  
STATE TAX DEPARTMENT

FILED

2008 JUL 31 AM 10: 01

SERIES 13X

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

WEST VIRGINIA FILM INDUSTRY INVESTMENT ACT

**§110-13X-1. General.**

1.1. Scope. -- This Legislative Rule is promulgated to provide for the general administration of the West Virginia Film Industry Investment Act, W. Va. Code §§ 11-13X-1, et seq. This Rule carries out the policy and purposes of the Statute, provides necessary clarification of the provisions of the Statute, and provides for the general administration of the Statute.

1.2. Authority. -- W. Va. Code §§ 11-13X-9, 11-10-5 and 11-10-5d(f).

1.3. Filing Date. -- \_\_\_\_\_.

1.4. Effective Date. -- January 1, 2008.

1.5. Citation. -- This Legislative Rule may be cited as §110 C.S.R., Series 13X.

**§110-13X-2. Definitions.**

2.1. "Commercial exploitation" means reasonable intent for public viewing for the delivery medium used.

2.2. "Film Office" means the West Virginia Film Office, which is a section of the West Virginia Division of Tourism, which, in turn, is a division of the West Virginia Department of Commerce.

2.3. "Direct production expenditure" means a transaction that occurs in the state of West Virginia or with a West Virginia vendor, and includes:

2.3.a. Payment of wages, fringe benefits or fees for talent, management or labor to a person who is a resident of West Virginia;

2.3.b. Payment to a personal services corporation for the services of a performing artist if:

2.3.b.1. The personal services corporation is subject to West Virginia income tax on those payments; and

2.3.b.2. The performing artist receiving the payments from the personal services corporation is subject to West Virginia income tax; and

2.3.c. Any of the following provided by a vendor:

- 2.3.c.1. The story and scenario (script) to be used by a qualified project;
- 2.3.c.2. Set construction and operations, wardrobe, accessories and related services;
- 2.3.c.3. Photography, sound synchronization, lighting and related services;
- 2.3.c.4. Editing and related services;
- 2.3.c.5. Rental of facilities and equipment;
- 2.3.c.6. Leasing of vehicles;
- 2.3.c.7. Food or lodging;
- 2.3.c.8. Airfare if purchased through a West Virginia-based travel agency or travel company;
- 2.3.c.9. Insurance coverage and bonding if purchased through a West Virginia-based insurance agent; and
- 2.3.c.10. Other direct costs of producing a qualified project in accordance with generally accepted entertainment industry practices.

2.4. "Personal services corporation" means a company that performs services in the field of performing arts, among other fields, and meets ownership and service tests as determined by the Internal Revenue Service.

2.5. "Payroll service company" means a business engaged in outsourcing solutions for human resources, payroll, tax and benefits administration.

2.6. "Loan-out corporation" means a company, usually established as an S-corporation, owned by one or more artists that provide the services of a performing artist to a third-party production company, i.e., an eligible company for purposes of this statute.

2.7. "Eligible company" means a person or business entity engaged in the business of producing film industry productions.

2.8. "Feature length" means in excess of forty minutes.

2.9. "Federal new markets tax credit program" means the tax credit program codified as Section 45D of the United States Internal Revenue Code of 1986, as amended.

2.10. "Film industry production" means a qualified project intended for reasonable national or international commercial exploitation.

2.11. "Full-time" employees are determined based on principal production employment levels, rather than pre-production or post-production levels. Since talent and crew work under

different circumstances and work hours vary, industry standards will be taken into consideration when evaluating full-time employees.

2.12. "Performing artist" means a person hired by an eligible company to perform services associated with the artist's particular craft in any department associated with a qualified project.

2.13. "Post-production expenditure" means a transaction that occurs in West Virginia or with a West Virginia vendor after the completion of principal photography, including editing and negative cutting, Foley recording and sound effects, automatic dialogue replacement (also known as ADR or dubbing), special effects or visual effects, including computer-generated imagery or other effects, scoring and music editing, sound editing, beginning and end credits, soundtrack production, subtitling or addition of sound or visual effects; but not including expenditure for advertising, marketing, distribution or expense payments.

2.14. "Qualified project" means a feature length theatrical or direct-to-video motion picture, a made-for-television motion picture, a commercial, a music video, commercial still photography, a television pilot program, a television series and a television mini-series that incurs a minimum of twenty-five thousand dollars in direct production expenditures and post-production expenditures, as defined by this subsection, in West Virginia. The term excludes news or current affairs programming, a weather or market program, an interview or talk show, a sporting event or show, an awards show, a gala, a production that solicits funds, a home shopping program, a program that primarily markets a product or service, political advertising or a concert production.

2.14.a. A qualified project may be produced on any single media or multimedia program that:

2.14.a.1. Is fixed on film, digital medium, videotape, computer disk, laser disc or other similar delivery medium;

2.14.a.2. Can be viewed or reproduced;

2.14.a.3. Is not intended to and does not violate a provision of article eight-c, chapter sixty-one of this code;

2.14.a.4. Does not contain obscene matter or sexually explicit conduct, as defined by article eight-a, chapter sixty-one, of this code;

2.14.a.5. Is intended for reasonable commercial exploitation for the delivery medium used; and

2.14.a.6. Does not contain content that portrays the State of West Virginia in a significantly derogatory manner.

2.15. "Reviewing committee" means a committee consisting of the following persons:

2.15.a The Secretary of the West Virginia Department of Commerce (or designee),

2.15.b The Secretary of the West Virginia Department of Education and the Arts (or

designee),

2.15.c The Director of the West Virginia Film Office (or designee),

2.15.d The Commissioner of the West Virginia Division of Tourism (or designee),

2.15.e The Tax Commissioner (or designee) and

2.15.f An additional representative of the West Virginia Film Office to be appointed by the Commissioner of Tourism.

2.16. "Tax Commissioner" means the West Virginia State Tax Commissioner or his or her designee.

### **§110-13X-3. Overview of the Tax Credits.**

3.1. Purpose. – The Statute creates a tax credit program through which an eligible company receives a tax credit for creating qualified projects in West Virginia.

3.2. Establishment of the tax credit. – Upon approval of a credit entitlement by the Film Office, an eligible company may apply for, and the Tax Commissioner shall allow, a nonrefundable tax credit in an amount equal to the percentage specified in this article of:

3.2.a. Direct production expenditures incurred in West Virginia that are directly attributable to the production in West Virginia of a qualified project and that occur in West Virginia or with a West Virginia vendor; and

3.2.b. Post-production expenditures incurred in West Virginia that are:

3.2.b.1. Directly attributable to the production of a qualified project;

3.2.b.2. For services performed in West Virginia.

3.2.c. Expenditures utilized by an eligible company as qualified investment or qualified expenditures for purposes of establishing or calculating the tax credit authorized by this article shall in no event be utilized by the eligible company for the purpose of calculating or qualifying investment for claiming the economic opportunity tax credit authorized by article thirteen-q of this chapter or the manufacturing investment tax credit authorized by article thirteen-s of this chapter.

3.3. Tax credit allowed. – The amount of tax credit allowed to an eligible company shall be:

3.3.a. Base allowance. – The base amount of tax credit shall be twenty-two percent.

3.3.a.1. For taxable years beginning prior to the first day of January, two thousand ten, there shall be an additional credit of five percent.

3.3.b. Extra allowance for hiring of local workers. – The base allowance shall be increased by:

3.3.b.1. An additional four percent if the eligible company, or its authorized payroll service company, employs ten or more West Virginia residents as part of its full-time employees working in the state or as apprentices working in the state.

3.4. Limitation of the credits. – The tax credits shall be limited as follows:

3.4.a. No more than ten million dollars of the tax credits shall be allocated by the Film Office in any given West Virginia State fiscal year. The Film Office shall allocate the tax credits in the order the eligibility applications therefore are received and approved.

3.4.b. The additional five percent tax credit provided for in section 3.3.a.1. shall not be available with respect to expenditures attributable to the qualified project for which the eligible company receives a tax credit pursuant to the federal new markets tax credit program.

#### **§110-13X-4. Application of the Tax Credit.**

4.1. Application of the tax credit. – The tax credit shall be applied to the eligible company's state tax burden as follows:

4.1.a. Credit allowed. – Beginning in the taxable year that direct production or post-production expenditures are incurred, an eligible company and the owners of an eligible company, are permitted a credit against the taxes imposed in the order specified in this section.

4.1.a.1. Business franchise tax. -- The credit is first applied to reduce the taxes imposed by W. Va. Code §§ 11-23-1, et seq. for the taxable year, determined after application of the credits against tax provided in W. Va. Code § 11-23-17 of said article, but before application of any other allowable credits against tax.

4.1.a.2. Corporation net income taxes. -- After application of section 4.1.a.1., any unused credit is next applied to reduce the taxes imposed by W. Va. Code §§ 11-24-1, et seq. for the taxable year, determined before application of other allowable credits against tax.

4.1.a.3. Personal income tax. -- If the eligible taxpayer is an electing small business corporation (as defined in section 1361 of the United States Internal Revenue Code of 1986, as amended), a partnership, a limited liability company that is treated as a partnership for federal income tax purposes or a sole proprietorship, then any unused credit is allowed as a credit against the taxes imposed by W. Va. Code §§ 11-21-1, et seq. on the income from business or other activity subject to tax under W. Va. Code §§ 11-23-1, et seq. or on income of a sole proprietor attributable to the business.

Electing small business corporations, limited liability companies, partnerships and other unincorporated organizations shall allocate the credit allowed by W. Va. Code §§ 11-13X-1, et seq. among its members in the same manner as profits and losses are allocated for the taxable year.

**§110-13X-5. Requirements for Tax Credit; Application for Tax Credit.**

5.1. In order for any eligible company to claim a tax credit under this W. Va. Code §§ 11-13X-1, et seq., it shall comply with the following requirements:

5.1.a. Each qualified project must incur a minimum of twenty-five thousand dollars in expenditures in West Virginia or with a West Virginia vendor.

5.1.b. If the qualified project contains production credits, the eligible company shall agree, upon request by the Film Office, to recognize the State of West Virginia with the following acknowledgement in the end credit roll: "Filmed in West Virginia with assistance of the West Virginia Film Industry Investment Act";

5.1.c. Apply to the Film Office on forms and in the manner the Film Office may prescribe.

5.1.c.1. The eligible company shall submit to the Film Office one (1) completed West Virginia Film Industry Investment Act eligibility application, with original signatures and attachments. The eligible company should submit an eligibility application as far in advance as possible prior to the first expenditure in West Virginia. However, an eligible company may choose to submit an application at any time during production or after production. But the applicant runs the risk of there being no tax credits remaining under the statutory maximum. The reviewing committee may deny the application if it does not meet all eligibility requirements.

5.1.c.2. The application shall include, but not be limited to:

5.1.c.2.A. A completed West Virginia Film Industry Investment Act eligibility application;

5.1.c.2.B. A copy of the script, or, for commercials, music videos or commercial still photography a copy of the storyboards or shot lists;

5.1.c.2.C. Proof or status of financing or distribution arrangements;

5.1.c.2.D. A copy of the budget top sheet, which contains a dedicated column that identifies estimated direct production expenditures and post-production expenditures that will be incurred in West Virginia;

5.1.c.2.E. Signature and verification by the applicant or by a duly authorized representative of the applicant;

5.1.c.2.F. The full legal name and tax identification number of the applicant;

5.1.c.2.G. The applicant's physical address, mailing address and telephone number;

5.1.c.2.H. A certified copy of its certificate of incorporation, articles of organization, or other similar documents that verify applicant is in good standing and registered to do business in the state of West Virginia.

5.1.d. Application forms may be obtained from the West Virginia Film Office.

5.1.e. Upon award of a tax credit, eligible company must begin production within one hundred eighty (180) days of issuance of the tax credit voucher or certificate, or shall otherwise forfeit the right to claim any tax credit for the approved qualified project. Such forfeiture does not preclude the eligible company from resubmitting an eligibility application for the same project at a future date.

5.2. The applicant shall submit to the Film Office information required by the Film Office to demonstrate conformity with the requirements of this section and shall agree in writing:

5.2.c.1. To pay all obligations the eligible company has incurred or will in future incur in West Virginia;

5.2.c.2. To publish, at completion of principal photography, a notice at least once a week for three consecutive weeks in local newspapers in regions where filming or production has taken place to notify the public of the need to file creditor claims against the eligible company by a specified date;

5.2.c.3. That outstanding obligations are not waived should the creditor fail to file by the specified date; and

5.2.c.4. To delay filing a claim for the tax credit authorized by this article until the Film Office delivers written notification to the Tax Commissioner that the eligible company has fulfilled all requirements for the credit.

5.3. Upon completion of a qualified project, the eligible company shall:

5.3.a. File all required West Virginia tax reports and returns for all applicable tax years and pay any balance of West Virginia tax due;

5.3.b. All claims for the tax credit shall be filed with an expense verification report prepared by an independent certified public accountant, utilizing "Agreed Upon Procedures" which are prescribed by the Film Office in accordance with generally accepted auditing standards in the United States. The certified public accountant will render a report as to the qualification of the credits, consistent with guidelines to be determined by the Film Office and approved by the Tax Commissioner; and

5.3.c. An eligible company claiming an extra allowance for employing local workers shall submit to the Film Office documentation verifying West Virginia residency for all individuals claimed to qualify for the extra allowance. The documentation shall include the name, home address and telephone number for all individuals used to qualify for the extra allowance.

5.4 Disqualification. The Film Office may disqualify in whole or in part any investment or

expenditure from eligibility for tax credit if it appears that the economic substance of an expenditure is not for services substantially rendered in West Virginia, or is for the purchase or lease of tangible personal property not used or operated in West Virginia or is for purchases or leases of realty not located in West Virginia.

5.4.a The Film Office may disqualify in whole or in part any investment or expenditure from eligibility for tax credit if it appears that the economic substance of an expenditure or transaction constitutes self dealing or an expenditure or investment primarily directed to or received by the purchaser or investor, or by an alter ego of the purchaser or investor or by a related person related to the purchaser or investor or by a member of the same controlled group as the controlled group to which the purchaser or investor belongs.

5.4.b For purposes of this rule, 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 of the voting power of all classes of stock of each of the corporations is owned directly or indirectly by one or more of the corporations; and the common parent owns directly stock possessing at least fifty percent of the voting power of all classes of stock at least on of the other corporations.

5.4.c. For purposes of this rule, the term "related person" means a corporation, partnership, association or trust controlled by the taxpayer; or an individual, corporation, partnership, association or trust that is in control of the taxpayer.

5.4.d. For purposes of this rule the singular case as used in this section 5.4 et seq. includes the plural and vice versa, as circumstances may dictate;

5.4.e. For purposes of this rule, the terms "taxpayer," "purchaser," and "investor" mean and include any person or entity seeking to establish entitlement to the tax credit addressed in this rule, or any person or entity making expenditures, or making investment or making purchases for which the purchaser, investor or taxpayer purports to directly or indirectly establish entitlement to the tax credit.

5.4.f, For purposes of this rule, an entity or person is presumed to be an alter ego, nominee or instrumentality of another person, entity or business if:

5.4.f.1, More than twenty percent of the real assets or more than twenty percent of the operating assets or more than twenty percent of the tangible personal property of one person, entity or business are or have been transferred to the other person, entity or business, or are or have been used in the operations of the other person, entity or business, or more than twenty percent of the real assets or more than twenty percent of the operating assets or more than twenty percent of the tangible personal property of one business are or have been used to collateralize or secure debts or obligations of the other person, entity or business.

5.4.f.2, Ownership of the persons, entities or businesses is so configured that the attribution rules of either Internal Revenue Code section 267 or Internal Revenue Code section 318 would apply to cause ownership of the persons, entities or businesses to be attributed to the same person, entity or business; or

5.4.f.3, Substantive control of the persons, entities or businesses is held or retained by the same person, entity or business, directly or indirectly, or through attribution under section 5.4.f.2 of this rule.

5.5. If the requirements of this section have been complied with as determined by the Film Office, the Film Office shall approve the tax credit and issue to the Tax Commissioner a document granting the appropriate tax credit to the eligible company.

#### **§110-13X-6. Application Receipt and Review.**

6.1. The Film Office shall determine and report to the Tax Commissioner in a manner and at times the Film Office and the Tax Commissioner shall agree upon:

6.1.a. The eligibility of the company and a proposed project;

6.1.b. The maximum amount of the tax credit available to the eligible company based on estimated "direct production expenditures" and "post-production expenditures."

6.2. The Film Office shall reserve tax credits for an eligible company by:

6.2.a. Reserving the credits to eligible companies in the order in which eligibility applications are received and approved by the Film Office;

6.2.b. Ensuring that the amount of reserved and allocated credits for the given year does not exceed the maximum available credit as limited by statute.

6.2.c. By notifying the eligible company, in writing, of the amount of credits that have been reserved for the eligible company and providing copies of the notification to the Tax Commissioner.

6.3. The Film Office shall receive eligibility applications on a first-come, first served basis during regular business hours beginning on and after January 1, 2008. The Film Office shall record the time and date of receipt of an eligibility application.

6.4. The Film Office shall review all eligibility applications in the order of their receipt to determine if each application is complete. When it is determined that an eligibility application is complete, the reviewing committee will, in the orderly course of business, review the applications in the order of their receipt to determine if the applicant and the proposed project meet the eligibility requirements to apply for the tax credit. The reviewing committee's determination shall be made within thirty (30) days of the eligibility application's receipt. The eligibility application shall be considered received, for purposes of the time requirements set forth herein, and for purposes of assigning a queue position to the application for review by the reviewing committee, when the application is physically received by the Film Office.

6.5. In the event the Film Office determines an eligibility application to be incomplete, the Film Office shall notify the applicant, in writing, of the reasons for that determination and shall return the incomplete application to the applicant. The applicant may resubmit the eligibility application after correcting the deficiencies stated in the notice, but the amended resubmitted eligibility application must be received by the Film Office within twenty (20) days after the Film

Office sends the notice, in order for the application to be considered. Any amended application that is received by the Film Office more than twenty (20) days after the Film Office sends the notice may, within the sole discretion of the Film Office, be denied further consideration or may be added to the queue based on the actual date of physical receipt of the amended resubmitted application by the Film Office.

6.5.a.If an eligibility application, though incomplete, is designated by the Film Office as “substantially complete” as determined in the sole discretion of the Film Office, and if the amended resubmitted application is received within the 20 day requirement set forth herein, then the time of receipt of the amended resubmitted eligibility application, for the limited purposes of the queue position of the application for review by the reviewing committee, shall be considered to be the time of receipt of the initial eligibility application. However, if the time of receipt of the amended resubmitted application is more than twenty (20) days after the Film Office sends the notice, the applicant’s place in the queue is forfeited, and the resubmitted application may, within the sole discretion of the Film Office, be denied further consideration or may be added to the queue based on the actual date of physical receipt of the amended resubmitted application by the Film Office.

6.5.b.If an eligibility application is not “substantially complete” as determined in the sole discretion of the Film Office, the applicant is required to amend and resubmit the application. And if the amended resubmitted application is received within the 20 day requirement set forth herein, then the time of receipt of the amended resubmitted eligibility application, for all purposes, including the queue position of the application for review by the reviewing committee, shall be the actual time of physical receipt of the amended resubmitted eligibility application by the Film Office. However, if the time of receipt of the amended resubmitted application is more than twenty (20) days after the Film Office sends the notice, the resubmitted application may, within the sole discretion of the Film Office, be denied further consideration or may be added to the queue based on the actual physical date of receipt of the amended resubmitted application by the Film Office.

6.6. False Information. – Upon the submittal of any false or misleading information by an applicant, the Film Office may reject the application and deny further consideration of the applicant for qualification in that and subsequent fiscal years.

6.7. Complete Application. – Upon a determination by the Film Office that an eligibility application is complete, the Film Office shall place the complete application on the agenda of the next duly or regularly scheduled meeting of the reviewing committee. Complete applications shall be placed on the agenda in the order of their receipt by the Film Office.

6.8. Action of reviewing committee. – The allocation of all tax credits under this Rule must be approved by the reviewing committee. The reviewing committee shall consider all completed applications in the order they are placed on the agenda. Once an applicant and a project described in an eligibility application have been determined by the reviewing committee to meet the eligibility requirements of the Statute and Rule, the Film Office shall notify the Tax Commissioner in writing of the eligibility of the company and the project and the maximum amount of the tax credit to be reserved for the eligible company.

**§110-13X-7. Uses of Credit; unused credit; carry forward; carry back prohibited; expiration and forfeiture of credit.**

7.1. No credit is allowed under this section against any employer withholding taxes imposed by article twenty-one, of this chapter.

7.2. If the tax credit allowed under W. Va. Code §§ 11-13X-1, *et seq.* in any taxable year exceeds the sum of the taxes enumerated in W. Va. Code §11-13X-7 for that taxable year, the excess may be applied against those taxes, in order and manner stated in W. Va. Code § 11-13X-7, for succeeding taxable years until the earlier of the following:

7.2.a. The full amount of the excess tax credit is used;

7.2.b. The expiration of the second taxable year after the taxable year in which the expenditures were occurred. The tax credit remaining thereafter is forfeited; or

7.2.c. The excess tax credit not otherwise expired or forfeited is transferred or sold.

7.3. No carry back to a prior taxable year is allowed for the amount of any unused portion of any annual credit allowance.

7.4. The transfer or sale of this credit does not extend the time in which the credit can be used. The carry forward period for credit that is transferred or sold begins on the date on which the credit was originally granted by the Film Office.

7.5. Any tax credit certificate or voucher issued in accordance with this article, which has been issued to an eligible company, and to the extent not previously claimed against the tax of the eligible company or the owner of the certificate, may be transferred or sold by such eligible company or owner of the certificate to another West Virginia taxpayer, subject to the following conditions:

7.5.a. A single transfer or sale may involve one or more transferees, assignees or purchasers. A transfer or sale of the credits may involve multiple transfers to one or more transferees, assignees, or purchasers;

7.5.b. Transferors and sellers shall apply to the Film Office for approval of any transfer, sale or assignment of the tax credit. Any amount of the tax credit that has been transferred or assigned shall be subject to the same limitations and conditions that apply to the eligible company's or seller's entitlement, use and application of the credit. The application for sale, transfer or assignment of the credit shall include the transferor's tax credit balance prior to transfer, the credit certificate number, the name of the seller, the transferor's remaining tax credit balance after transfer, if any, all tax identification numbers for both transferor and transferee, the date of transfer, the amount transferred, a copy of the credit certificate and any other information required by the Film Office or the tax credit.

7.5.c. The Tax Commissioner shall not approve the transfer or assignment of a tax credit to a taxpayer if the seller or transferor has an outstanding tax obligation with the State of West Virginia for any prior taxable year.

7.6. The transferee, assignee or purchaser shall apply such credits as authorized in West Virginia Code § 11-13X-1 *et seq.*

7.7. For purposes of this chapter, any proceeds received by the eligible company or transferor for its assignment or sale of the tax credits allowed pursuant to this section are excepted from the West Virginia consumers sales and service tax and use tax as a sale or transfer of an intangible, but will be subject to corporate net income tax and personal income tax, to the extent includible in federal taxable income or federal adjusted gross income.

7.8. Tax credits will be subject to recapture, elimination or reduction if it is determined by the Tax Commissioner that a taxpayer was not entitled to the credit, in whole or in part, in the tax year in which it was claimed by the taxpayer. In the event of a transfer or sale of unused credit, the duty of compliance with all applicable statutes and rules relating to application and use of the credit, including any liability for recomputation or recapture of the credit, first falls on the seller or transferor, rather than the presumed innocent buyer, or credit transferee. However, both the seller and the buyer are jointly and severally liable for any statutory violations relating to entitlement, use and application of the credit and any recomputation or recapture thereof.

7.9. Failure to comply with this section will result in the disallowance of the tax credit until the taxpayers are in full compliance.

7.10. Should an approved qualified project fail to begin production within the time specified in section 5.1.e. of these rules, the eligible company shall forfeit the right to claim any tax credit for the approved qualified project and the Film Office shall release the reserved credit and cause it to be available for the next eligible qualified project in the queue for approval. Such forfeiture does not preclude the eligible company from resubmitting an application for the same project at a future date.

#### **§110-13X-8. Uses of credit; transferability.**

8.1. The tax credit may be applied to reduce taxes imposed by articles twenty-three (business franchise tax), twenty-four (corporate net income tax) and twenty-one (personal income tax) of Chapter 11 of the West Virginia Code in the tax year the investment is placed in service after approval of the project by the Film Office (with potential carry forward for an additional 2 years). The credit may be taken into account in computing estimated payments.

8.2 In the event of a transfer or sale of unused credit, the duty of compliance with all applicable statutes and rules relating to application and use of the credit, including any liability for recomputation or recapture of the credit, first falls on the seller or transferor, rather than the presumed innocent buyer, or credit transferee. However, both the seller and the buyer are jointly and severally liable for any statutory violations relating to entitlement, use and application of the credit and any recomputation or recapture thereof.

8.3 After approval by the Film Office of any transfer, sale or assignment of the tax credit, pursuant to W.Va. Code §11-13X-8, the transferee shall acquire the amount of credit that remains available under that article. The transferor and the transferee or transferees may apply the credit against tax in the year of the transfer, and succeeding years in accordance with the amount of credit to which each is entitled, but the dollar amount of credit available to each shall not be exceeded or duplicated.

### **§110-13X-9. Burden of proof.**

9.1. The burden of proof is on the eligible company or credit transferee claiming the credit allowed by this article to establish by clear and convincing evidence that the eligible company or transferee is entitled to the amount of credit asserted for the taxable year.

### **§110-13X-10. Tax credit review and accountability.**

10.1. Pursuant to the requirements of West Virginia Code §11-13X-11, beginning on the first day of the third taxable year after the passage of W. Va. Code §§ 11-13X-1, *et seq.* and every two years thereafter, the Film Office shall submit to the Governor, the President of the Senate and the Speaker of the House of Delegates a tax credit review and accountability report evaluating the cost effectiveness of the West Virginia Film Industry Investment Act during the most recent two-year period for which information is available. The criteria to be evaluated shall include, but will not be limited to, for each year of the two-year period:

- 10.1.a. The number of eligible companies claiming the credit;
- 10.1.b. The dollar amount of tax credit certificates issued to taxpayers;
- 10.1.c. The number of new businesses created by the tax credit;
- 10.1.d. The number of new jobs, if any, created by the tax credit;
- 10.1.e. The amount of direct expenditures made on qualified projects; and
- 10.1.f. The cost of the credit.

10.2. Eligible companies claiming the credit shall provide any information the Tax Commissioner and the Film Office may require to prepare the report: The information provided is subject to the confidentiality and disclosure provisions of the West Virginia Tax Procedure and Administration Act. West Virginia Code §11-10-1 *et seq.* However, notwithstanding the provisions of West Virginia Code §§11-10-5d and 5s, the Tax Commissioner is authorized to disclose to the Film Office such tax information as may be necessary to compile the records, reports and recommendations required by and section 12 of this rule and by West Virginia Code §§11-13X-11 and 12. The Film Office is hereby designated by the Tax Commissioner as a "person having a material interest" in such information in accordance with the provisions of West Virginia Code §11-10-5d(f).

### **§110-13X-11. Confidentiality.**

11.1. All information submitted to the Tax Commissioner and the Film Office is confidential and not subject to public disclosure when filed with the Film Office or Tax Commissioner except as otherwise provided in this rule or the West Virginia Code.

11.2. All information submitted to the Film Office pursuant to an eligibility application for designation as an eligible company and documents related to the application, are confidential and not subject to public disclosure, as specified herein, when filed with the Film Office,

except the following in accordance with West Virginia Code §11-13X-11:

11.2.a. The full legal name of the applicant;

11.2.b. The mailing and office addresses and telephone number of the applicant;  
and

11.2.c. The name of a person to contact for the applicant.

11.3. All records and documentation relating to application, evaluation or qualification of a company or a project for the tax credit authorized under West Virginia Code §11-13X-1 *et seq.* is tax information subject to the confidentiality restrictions of the West Virginia Tax Procedure and Administration Act, West Virginia Code §11-10-1 *et seq.*, including, but not limited to, the provisions of West Virginia Code §11-10-5d.

11.4. Such confidential information, relating to application, evaluation or qualification of a company or a project, including general correspondence to or from the Film Office, or to or from the West Virginia Tax Department, including information generated internally by the Film Office or Tax Department, including but not limited to, internal memoranda and reports, is confidential and not subject to public disclosure, unless otherwise provided by statute or rule.

11.5. All tax returns and tax return information subject to the non-disclosure restrictions of W. Va. Code § 11-10-5d are confidential, except for the information subject to disclosures authorized, mandated or permitted pursuant to the West Virginia Tax Procedure and Administration Act, or W. Va. Code §11-10-5s or West Virginia Code §11-13X-1 *et seq.* .

#### **§110-13X-12. Economic Development.**

12.1. The West Virginia Film Office, in consultation and coordination with appropriate public and private entities, shall promote, foster, encourage and monitor the development of the film industry in this state as part of its comprehensive economic development strategy for West Virginia and report recommendations for expanding the industry in the state to the Governor and Joint Committee on Government Finance annually on or before the first day of December.

#### **§110-13X-13. General Procedure and Administration.**

13.1. Requirements to Claim the Tax Credit. – To claim a tax credit, the eligible company shall comply with the Statute and this Rule and shall timely provide complete and accurate forms, returns, schedules and other information required by the Tax Commissioner or Film Office.

13.2. Applicability of Various Tax Laws. – Application of this credit and eligibility for this credit shall not abrogate application of the provisions of W. Va. Code §§ 11-23-1, et seq. (Business Franchise Tax), W. Va. Code §§ 11-24-1, et seq. (Corporation Net Income Tax) and W. Va. Code §§ 11-21-1, et seq. (Personal Income Tax), and rules issued pursuant to those statutes, with respect to any eligible taxpayer or owner of any eligible taxpayer to the extent that they may be subject to the provisions of those laws, and shall not abrogate application of the provisions of W. Va. Code §§ 11-10-1, et seq. (Procedure and

Administration) which provides for administration of those taxes.

13.3. Maintenance of Records. - An eligible company that does not maintain the records required to verify the validity of its eligibility for the tax credit and the accuracy of the amount of the tax credit claimed may be denied the tax credit.

**§110-13X-14. Effective date.**

14.1. The credit allowed by W. Va. Code §§ 11-13X-1, et seq. shall be allowed upon eligible expenditures occurring after the thirty-first day of December, two thousand seven.

14.2. The amendments to this article enacted in the year two thousand eight shall apply to all taxable years beginning after the thirty-first day of December, two thousand seven, and shall apply with retroactive effect with relation to taxable years beginning prior to the date of passage of such amendments.