

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

Form #3

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2000 AUG 29 PM 3:15

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: State Tax Department TITLE NUMBER: 110

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

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

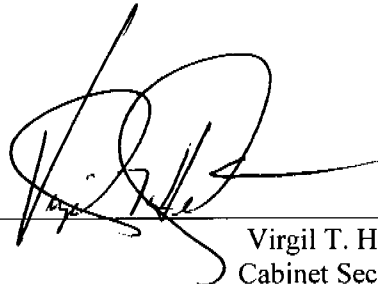
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 13X

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

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



Virgil T. Helton
Cabinet Secretary
West Virginia Department of Revenue

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 29, 2008

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* State Tax Department
P.O. Box 1005
1001 Lee Street, East
Charleston, WV 25301
(304)558-5330

LEGISLATIVE RULE TITLE: 110

1. Authorizing statute(s) citation W Va. Code §§11-13X-9, 11-10-5, 11-10-5d(f)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
July 31, 2008

b. What other notice, including advertising, did you give of the hearing?
None

c. Date of Public Hearing(s) *or* Public Comment Period ended:
August 29, 2008 at 3:00 p.m.

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

August 29, 2008

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Mark Melton, General Counsel for Revenue Operations

P.O. Box 1005

1001 Lee St., East

Charleston, WV 25301

(304)558-5330

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

b. Date of hearing or comment period:

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached

**SUMMARY FOR 110-13X
WEST VIRGINIA FILM INDUSTRY ACT**

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.*

A summary of changes to the proposed rule is as follows:

<u>Page</u>	<u>Section</u>	<u>Change</u>
2	2.6	Definition of “loan-out corporation” changed.
	2.11	Definition of “full-time” employee changed.
3	2.12	Definition of “performing artist” changed.
5	3.3.b.1	Clarifying time period West Virginia residents must be hired to claim 4% extra allowance.
	3.3.b	New section, 3.3.b.2 added clarifying use of 4% extra allowance.
	3.4	Language added regarding yearly allocations.
6	5.1.c.1	Language added regarding eligibility of qualified costs for any remaining tax credits.
7	5.1.e	Time period in which to begin production reduced from 180 days to 120 days.
	5.2	New section relating to allocation year.
8	5.3.b	Clarified status of independent certified public account.
11	7.4	New section 7.4.a added providing current year West Virginia tax returns need not be filed prior to the transfer of film credit by an eligible transferor.
12	7.7	Made language regarding taxability consistent with W. Va. Code 11-13X-8(g).

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

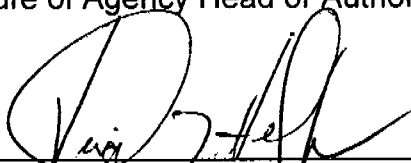
Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

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: _____

8/29/08

Signature of Agency Head or Authorized Representative:



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

TITLE 110
LEGISLATIVE RULE
STATE TAX DEPARTMENT

SERIES 13X

WEST VIRGINIA FILM INDUSTRY INVESTMENT ACT

FILED
2008 AUG 29 PM 3:15
OFFICE WEST VIRGINIA
SECRETARY OF STATE

§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 owned by one or more artists that provide the services of a performing artist to a payroll service company or 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 employment levels during principal production, 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 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 during principal production as part of its full-time employees working in the state or as apprentices working in the state.

3.3.b.2. If the jobs threshold required by W. Va. Code §11-13X-5(b) is met for purposes of entitlement to the four percent extra allowance, then the additional tax credit applies to all expenditures attributable to the qualified project for which the eligible company receives a tax pursuant to this article. It is not limited to costs incurred only during principal production.

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. Qualified costs incurred prior to the approval of an application are eligible for the incentive if there are tax credits remaining within the ten million dollar cap at the time of approval.

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 twenty (120) 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.

5.2.d Each allocation year stands on its own. It is necessary for a project sponsor to file a new application for each year in order to be considered for credit allocation in each specific year. Projects are approved on a first come, first served basis. The maximum amount of project tax credit for any taxable year is the amount allocated by the Film Office through the project review and certification process.

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 licensed to practice in the United States, 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 twenty (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 twenty (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.

7.4.a. Current year West Virginia tax returns need not be filed prior to the transfer of film credit by an eligible transferor.

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, and will not be subject to corporate net income tax and personal income tax..

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.



COPY

08-247 dm



**ALLEGHENY
IMAGE FACTORY**

471 Ash Road
Coatesville, PA 19320

115 Hoffman Ave.
Morgantown, WV 26505

August 21, 2008

West Virginia Tax Department
Legal Division
P.O. Box 1005
Charleston WV 25324-1005

RE: West Virginia Film Industry Act

West Virginia Tax Department:

RECEIVED
AUG 25 2008
WV TAX DEPARTMENT
LEGAL DIVISION

I have reviewed the WV Film Industry Investment Act and would like to make the following comment:

In section 7.8 on the issue of recapture, the language will make it nearly impossible for productions to utilize the WV state tax credit. The rule states that in the event of a transfer "recapture of the credit first falls on the "seller" and then to the "buyer". Before commencement of our production, I created a corporation in WV to handle the business affairs associated with our film. That Corporation will be dissolved the once the last production transaction is completed (that last transaction will be the sale of the credits). This means, the "buyer" is the only available entity that can be pursued for recapture. It will be impossible to find buyers that are willing to be held accountable for the actions of a business they have no ties to.

Ironically, the solution to this issue is already in place should one choose to apply it properly.

5.3b requires our production to submit an "expense verification report" created by a third party. Without this report, and its subsequent verification by the state to prevent fraud, the tax credit cannot be released. If the report survives this verification process, what could be left? If that report cannot be accepted as valid proof of following the

regulations, then why is it being done? It strikes one almost as "double-jeopardy". Certainly, if we were talking about something like heavy industry that has the opportunity to hide pollution or something of this nature, one could make a case for extending liabilities. But, as stated above, these issues will be examined in detail by the state before the credit is released. If the state's own examiners cannot be trusted in the matter, why engage in the process at all. In fact, if the credit cannot be in a fashion that makes film investment in West Virginia possible, why make it available in the first place?

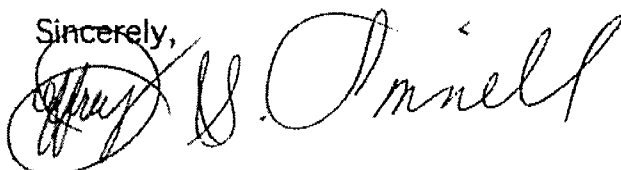
I'd also wish like to point out that when I signed the application for credits, I was signing as an officer of the Corporation. If I was signing as an individual and placing my personal property at risk, I would like to immediately withdraw my application.

To be absolutely clear - I must have a tax credit that the State of WV will verify as a valid credit before I can sell it. If this isn't resolved I will, with a heavy heart, be forced to move my production to a state which has a more favorable incentive program. This is not some negotiating tactic aimed at increasing my leverage. This is a simple fact of modern film finance. I would strongly encourage verifying my opinion by speaking to one of the firms that specialize in selling tax credits.

In closing, let me say that I believe the film tax credit can be a valuable weapon in West Virginia's economic arsenal - but like all weapons it must be used properly in order to be effective. The state government showed real foresight in putting the credit in place. I am confident that, when faced with the realities of the marketplace, that same government will work to ensure the credit can reach its full potential.

Please contact me immediately if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey S. Tinnell". The signature is written in a cursive, flowing style. The first name "Jeffrey" is written in a smaller, more compact script, while "S. Tinnell" is written in a larger, more prominent cursive.

Jeffrey S. Tinnell
President
Allegheny Image Factory, Inc

Allegheny Image Factory
471 Ash Road
Coatesville PA 19320

West Virginia Tax Department
Legal Division
P.O. Box 1005
Charleston WV 25324-1005

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August 25, 2008

Virgil T. Helton
Legal Division
State Tax Department
P.O. Box 1005
Charleston, WV 25324-1005

Joe Bessacini
Cast & Crew Entertainment, LLC
100 East Tujunga Ave 2nd Floor
Burbank, CA 91502
818-480-4427

Dear Virgil T. Helton:

The tax professionals at Cast & Crew, a leading entertainment payroll company, are routinely called upon to comment on proposed legislation, rules and regulations, with regard to film production incentives. We have over 27 years of tax related experience in the film entertainment industry. Over the years, we have developed strong relationships with the U.S. film offices, departments of revenue, and taxation. Our clients range from the largest major studios to the independent producer.

Here are our comments on the proposed rules for the West Virginia Film Industry Investment Act.

Sec 110-13X-2.3.a – Line 1, after wages, delete “fringe benefits” and, after the word fees insert “and costs for related fringe benefits provided...” Note that fringe benefits are not paid to the worker. These costs, such as, pension, health plan insurance, workers compensation, FICA, etc. are paid to various private/government entities on behalf of the workers.

Sec 110-13X-2.3.b.1 & b.2 – Please clarify what “subject to West Virginia income tax” means. It seems that any payment made to a company providing services in West Virginia is “subject to West Virginia income tax”. All monies earned in West Virginia are “subject to income tax”. These provisions are very similar to the New Mexico legislation but West Virginia should define what they mean for West Virginia. Is the personal service corporation required to show that it is registered to do business in West Virginia?

Sec 110-13X-2.6 - line 3, after production company, insert “or payroll services corporation”

Sec 110-13X-2.10 – Clarify that if the full time employee threshold is met during principal production then the additional 4% allowed under Sec 11-13X-5(b), of the legislation, applies to all costs and not just the costs during principal production. If this is not a correct interpretation, please clarify.

Sec 110-13X-3.3.b.1 – line two, after residents insert “during principal production”.

Sec 110-13X-5.1.c.1 add “Qualified costs incurred prior to the approval of an application are eligible for the incentive if there are tax credits remaining at the time of approval.”

Sec 110-13X-5.1e – line two, replace one hundred eighty (180) days and replace with “ ninety (90) days (an additional ninety (90) days may be awarded for good cause)”. Note that 180 days is too long to tie up your limited funds without any activity.

• • • • •

Sec 110-13X-5.3b -- Clarify whether or not the certified public accountant needs to be a "West Virginia" CPA.

There is some troubling language in the legislation that the rules cannot change. This centers on the recapture provisions. Currently, the legislation indicates that both transferors and transferees of sold, transferred, or assigned credits bear joint and several liability for any tax, interest or penalty. Very few corporations will purchase tax credits subject to recapture. If they do, it will be at a steep discount. How does this affect West Virginia? If the producer can only monetize 80% of the 27% tax credit, the real value to the producer is a credit equal to 21.6%. This haircut may be just enough the sway the producer to film in another state.

Thank you for the opportunity to comment on the proposed rules. If you have any questions please don't hesitate to contact me.

Warm Regards,

Joe Bessacini



MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

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WASHINGTON, D.C. 20006
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ANGELA H. MIELE
VICE PRESIDENT
STATE TAX POLICY

August 25, 2008

RECEIVED
AUG 26 2008
SECRETARY OF
REVENUE

RECEIVED
AUG 27 2008
WV TAX DEPARTMENT
LEGAL DIVISION

Mr. Virgil T. Helton
Cabinet Secretary Department of Revenue
and
Legal Division
Department of Revenue
State of West Virginia
1001 Lee Street
Charleston, WV 25301

VIA Federal Express

RE: MPAA Comments on Draft Rules - Film Industry Investment Tax Credit

Dear Mr. Helton:

I am writing on behalf of the members of the Motion Picture Association of America, Inc.* (MPAA), with comments on the proposed rules governing the Film Industry Investment Tax Credit Act. We appreciate the opportunity to provide comments and would be happy to discuss our concerns. The proposed new language is indicated with an underline and proposed language to be deleted is indicated with a ~~strikethrough~~.

Page 2, Section 2.6. We suggest deleting the phrase "usually established as an S corporation" because loan-out corporations can also be "C" corporations.
Section 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.

Page 2, Section 2.11. We suggest amending the provision to read as follows to more accurately define "full-time" employees in film and television production.
Section 2.11. "Full-time" employees are determined based on employment levels during principal photography production ~~employment levels~~, rather than pre-production or post-

* Walt Disney Studios Motion Pictures, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, NBCUniversal, Warner Bros. Entertainment Inc. and CBS as an affiliate member

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.

Page 3, Section 2.12. We suggest the deleting “by an eligible company.” It is very limiting as to the eligibility of certain performing artists. Performing artists may in fact be hired by a “loan out corporation.” If this provision remains, it could render payments to loan outs (for work performed by qualified performing artists) ineligible to qualify for the credit.

Section 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.

Page 5, Section 3.4 – The cap utilization is of concern to our members in a few regards. This is an important issue as decision makers want to know well in advance the benefits for which they will qualify. If the outcome is uncertain, it will make the program less attractive.

The draft rules outline the \$10 million statutory annual cap on credits; however, what happens when a taxpayer utilizes their statutory authority to carry forward? If, for example, \$5 million of the credit is used in the first year and \$3 million is carried forward to the second year; does this \$3 million count against future year's cap? The rules do not provide clear guidance in this regard. Additionally, the rules do not provide sufficient guidance in a situation where the cap is reached and a certain percentage of one of the productions' credit will exceed the cap. Let's say in that situation hypothetically, the second production should have received a \$6 million credit but only \$3million was left in year one's allocation. Does the remaining \$3million get credited in the following year and will it apply toward the succeeding year's annual credit cap?

Similarly, what happens if a single qualified production exceeds the \$10 million cap in a particular year? Will the production company receive the remaining credit (which is in excess of the \$10 million) in the succeeding year? Will that excess in year 2 count against the second year's \$10 million annual cap?

Page 12, Section 7.7. This provision, as we read it, contradicts the statute and we respectfully submit the provision should be amended to reflect the statute section 11-13X-7 subsection (g) of the Code of West Virginia, which reads as follows: (g) 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 exempt from the West Virginia consumers sales and service tax and use tax and from the corporate net income tax and personal income tax.

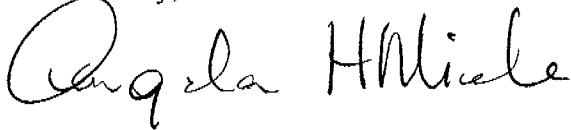
Section 7.7. For purposes of this chapter, any proceeds received by the eligible company or transferor for its assignment or sale of the tax credits allowed pursuant to this section are ~~excepted~~ exempt from the West Virginia consumers sales and service tax and use tax as a sale or transfer of an intangible, and will not ~~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.~~

Page 13, Sections 110-13X-10 through 11 – The confidentiality of the MPAA member company production data is of critical importance. We appreciate the draft rules discussion regarding the confidential nature of the film data provided by production companies. We understand the need for legislative reporting purposes in the aggregate by the Film Office; however, we respectfully submit the production data should not be made available in response to any general public inquiries. Additionally, the draft rules reference confidentiality of documents, except as provided in section 11-10-5d, which references “persons having material interest.” It is not clear who exactly would have material interest in certain proprietary production data or other application information as we do not know who qualifies as a “person having a material interest.” We would appreciate clarification on this as it is imperative to provide motion picture producers with assurances the production data will be protected in strictest confidence

Finally, we would like to provide comments on the attached “Eligibility Application” although the state did not ask for public comments on this document. Our concerns are as follows: on page 3 of the application it asks for phone and Emails for the producers and directors. This is an obscure request and we suggest the only detailed contact information needed is a primary and secondary contact and the tax credit contact. We would suggest any additional personal contact information for other production executives be provided to the state only upon approval of the particular production employee.

Thank you again for the opportunity to provide these comments and I am available to answer any questions or concerns.

Sincerely,

A handwritten signature in cursive script that reads "Angela H. Miele". The signature is written in black ink and is positioned below the word "Sincerely,".

Copies: Jamie Cope
Joe Gollehon – MPAA Legislative Advocate
MPAA Member Companies

Attachment



Tax Credits, LLC
45 Knightsbridge Road
Piscataway, NJ 08854
Ph 866.652.3170
Fx 732.885.2938

Tax Credits, LLC

Attention: Virgil T. Helton
Legal Division
State Tax Department
P.O. Box 1005
Charleston, WV 25324-1005

The professionals at Tax Credits, LLC have spent the last 10 years placing various tax credits throughout the United States. We have handled over 1,000 transactions, placing in excess of \$300 million in state tax credits to date. We keep in close contact with state film offices, departments of revenue, taxation, and economic development, as well as major studios, independent production companies, and large corporations who are annual, multi-state tax credit buyers. Within the past few years, our firm has been extremely instrumental in developing and implementing successful transferable film tax credit programs in several states.

Upon review of §§110 C.S.R., Series 13X of the West Virginia Film Industry Investment Act, we have identified an important issue that can prove detrimental to the success of this new program if not resolved now. If we are reading Sections 7.8 and 8.2 correctly, the transferee ("good faith" buyer) will be "jointly and severally liable for any statutory violations relating to entitlement..." Under no circumstances should a "good faith" transferee of film tax credits be subject to recapture. Very few corporations will purchase tax credits subject to recapture. If the purchase is actually made, it is done at a deep discount. Thus, if and when production companies monetize their credits after they are issued, they will receive considerably less in states with recapture to the buyer as opposed to states that have eliminated recapture.

Attached, please find a chart comparing each state's transferable film tax credits with respect to recapture. Of the 14 states currently offering film tax credit programs, only three have recapture including West Virginia. A year ago, seven states had recapture. Requiring a third-party review of expenses by an independent CPA, as provided for in Section 5.3.b., virtually eliminates any risk to the state, rendering recapture to the "good faith" buyer unnecessary. As such, many states have adopted the CPA requirement utilizing the "Agreed Upon Procedures" method of expense verification. States now have the benefit of knowing the expenses have been verified by an independent source which does not deplete state resources, and the credits are "clean"...allowing the production companies to materialize the full value of the incentive. Of course, West Virginia would always retain the right to recourse against the production company. Without these changes to the legislation, the West Virginia film tax incentive will not attract the requisite buyers, which may hinder the sustainability of the program.

We would further suggest that the following items be clarified:

1. Section 2.3.b The definition of a personal services corporation should not be limited to "performing artists," but should also be extended to include writers, directors, etc. This definition should be consistent with Section 2.4 and Section 2.6.
2. Section 3.4.a Please clarify how the \$10 million per year allocation operates. We suggest that any unused credits be carried over to the following year. Accordingly, the film office should maintain a queue and award credits as they become available. Film companies should be allowed to film now and receive credits when they are available, if they otherwise qualify for the program. In many cases, a production company will advance in the queue as other productions drop out. This issue must also carryover to Section 6.4.
3. Section 5.1.e The 180 day rule is excessive for a \$10 million program, only to the extent that it could possibly tie up credits for projects that are not legitimate. In other states, the time period ranges from 90 to 150 days. We would suggest reducing the time period to 120 days, and extend for good cause (i.e. financing is forthcoming) at the discretion of the film office.
4. Section 5.3.a Please define "applicable." It should mean that the seller must be current on its taxes in order to sell the credits. It should not mean that the current year taxes must be filed prior to the sale of the credits. In Pennsylvania, "applicable" refers to the year in which the tax credit is issued, and the statute requires that the applicable return be filed and all state obligations thereon be satisfied prior to the sale of credits. Therefore, in Pennsylvania the production company must file its tax return for the year in which the credit is issued before a tax credit can be sold. This puts an enormous financial strain on the production company, especially when the tax credit issued in the earlier part of its tax year, in which case the delay can be up to two years. Should the Department of Revenue require that the "current" year tax return be filed prior to the sale of the credits, this requirement must be communicated to every applicant. They will most likely structure a collapsible special purpose entity to make their picture, in order to facilitate the early filing of its tax return.

The professionals at Tax Credits LLC have worked very closely with Pamela Haynes and Jamie Cope of the West Virginia Film Office. We are excited to see West Virginia creating legislation for a film incentive program. This legislation will not only put West Virginia on the map with respect to film incentive programs, but will also showcase the state, create jobs, and bolster the state's economy. If there is anything further that we can do to assist in making this program successful, please do not hesitate to contact us at any time.

Kindest regards,

Bruce Deichl, President
Tax Credits LLC
45 Knightsbridge Road
Piscataway, NJ 08854
Ph: 866-652-3170
Fx: 732-885-2938

Comparative Analysis of Film Tax Credit Programs Pertaining to Recapture in Selected States

State	Percentage of Credit	Recapture to the Buyer?
Alaska	30%	NO NOTE 1
Arizona	20-30%	NO* NOTE 1
Connecticut	30%	NO* NOTE 1
Georgia	20-30%	YES*
Illinois	20%	NO NOTE 1
Iowa	25/50%	NO
Louisiana	25%	NO*
Massachusetts	25%	NO* NOTE 1
Missouri	35%	NO NOTE 1
New Jersey	20%	NO NOTE 1
Pennsylvania	25%	NO NOTE 1
Puerto Rico	40%	NO
Rhode Island	25%	YES*
West Virginia	27-31%	YES*

NOTE 1: Subject to third party CPA verification.

NOTE 2: * Indicates states that originally had recapture.

COMMENTS AND RESPONSES
110 C.S.R. 13X

Comment:

Page 1, Section 2.3.a. Line 1, after wages, delete “fringe benefits” and, after the word fees insert “and costs for related fringe benefits provided...” Note that fringe benefits are not paid to the worker. These costs, such as, pension, health plan insurance, workers compensation, FICA, etc. are paid to various private/government entities on behalf of the workers.”

Response to Comment:

110 C.S.R. 13X-2.a. mirrors the language contained in W. Va. Code §11-13X-3(b)(2)(A).

Comment:

Page 1, Section 2.3.b.1 & b.2 Please clarify what “subject to West Virginia income tax” means. It seems that any payment made to a company providing services in West Virginia is “subject to West Virginia income tax”. All monies earned in West Virginia are “subject to income tax”. These provisions are very similar to the New Mexico legislation but West Virginia should define what they mean for West Virginia. Is the personal service corporation required to show that it is registered to do business in West Virginia?

Response to Comment:

The starting point for determining the West Virginia corporate net income tax is federal taxable income. Certain modifications and certain allocation and apportionment requirements are applied to determine West Virginia taxable income. Note that for tax years beginning on and after January 1, 2009, the West Virginia corporate net income tax is determined based on a combined reporting basis.

The starting point for determining the West Virginia personal income tax is federal adjusted gross income. Certain statutory modifications then applied to determine West Virginia taxable income tax.

As a general rule West Virginia sourced income and income of West Virginia residents are subject to personal income tax. The term “subject to West Virginia income tax” appears frequently in Chapter 11 of the West Virginia Code, and is well understood by the accounting community and the West Virginia tax practitioner community.

The rule has not been amended to eliminate or change the use of the term.

In response to the question “Is the personal service corporation required to show that it is registered to do business in West Virginia?” – The answer is yes. With the exception of certain organizations specifically enumerated by statute, all

business entities having nexus with the State of West Virginia, including C corporations, S corporations, partnerships, Limited Liability Companies, trusts and individual entrepreneurs are required by West Virginia statute to obtain a West Virginia business registration certificate.

Because this disposition is clearly mandated by West Virginia statute, no amendment has been made to the proposed rule in response to this question.

Comment:

Page 1, Section 2.3.b. The definition of a personal services corporation should not be limited to "performing artists," but should also be extended to include writers, directors, etc. This definition should be consistent with Section 2.4 and Section 2.6.

Response to Comment:

The definition of "performing artist" contained in Section 2.12 was drafted broadly enough to encompass the services referenced in the Comment.

Comment:

Page 2, Section 2.6. We suggest deleting the phrase "usually established as an S corporation" [in the definition "loan-out corporation"] because loan-out corporation can also be "C" corporation.

Response to Comment:

The suggested change has been incorporated into the agency approved rule.

Comment:

Page 2, Section 2.6 - line 3, after production company, insert "or payroll services corporation".

Response to Comment: 110 C.S.R. 13X-2.6 has been incorporated into the agency approved rule to read as follows:

"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 payroll service company or a third-party production company, i.e., an eligible company for purposes of this statute."

Comment:

Page 2, Section 2.10 – Clarify that if the full time employee threshold is met during principal production then the additional 4% allowed under Sec 11-13X-5(b), of the legislation, applies to all costs and not just the costs during principal production.”

Response to Comment:

110 C.S.R. 13X2.11 is the correct citation of the subject matter referred to in the “Comment”, relating to the definition of “Full-time” employees. The suggested change has been incorporated Section 3.3.b by creating a new subdivision to read as follows:

3.3.b.2. If the jobs threshold required by W. Va. Code §11-13X-5(b) is met for purposes of entitlement to the four percent extra allowance, then the additional tax credit applies to all expenditures attributable to the qualified project for which the eligible company receives a tax pursuant to this article. It is not limited to costs incurred only during principal production.

Comment:

Page 2, Section 2.11. We suggest amending the provision to read as follows to more accurately define ‘full-time’ employees in film and television production.

Section 2.11. “Full-time” employees are determined based on employment levels during principal photography 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.

Response to Comment:

The suggested change has been incorporated into the agency approved rule.

Comment:

Page 3, Section 2.12. We suggest the deleting “by an eligible company.” It is very limiting as to the eligibility of certain performing artists. Performing artists may in fact be hired by a “loan out corporation.” If this provision remains, it could render payments to loan outs (for work performed by qualified performing artists) ineligible to qualify for the credit.

Response to Comment:

The suggested change has been incorporated into the agency approved rule, but with added deletion of the word “by” as follows:

Section 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.

Comment:

Page 5, Section 3.3.b.1 – line two, after residents insert ‘during principal production’.

Response to Comment:

The suggested change has been incorporated into the agency approved rule.

Comment:

Page 5, Section 3.4 - The cap utilization is of concern to our members in a few regards. This is an important issue as decision makers want to know well in advance the benefits for which they will qualify. If the outcome is uncertain, it will make the program less attractive.

The draft rules outline the \$10 million statutory annual cap on credits; however, what happens when a taxpayer utilizes their statutory authority to carry forward? If, for example, \$5 million of the credit is used in the first year and \$3 million is carried forward to the second year; does this \$3 million count against future year's cap? The rules do not provide clear guidance in this regard. Additionally, the rules do not provide sufficient guidance in a situation where the cap is reached and a certain percentage of one of the productions' credit will exceed the cap. Let's say in that situation hypothetically, the second production should have received a \$6 million credit but only \$3 million was left in year one's allocation. Does the remaining \$3 million get credited in the following year and will it apply toward the succeeding year's annual credit cap?

Similarly, what happens if a single qualified production exceeds the \$10 million cap in a particular year? Will the production company receive the remaining credit (which is in excess of the \$10 million) in the succeeding year? Will that excess in year 2 count against the second year's \$10 million annual cap?

Response to Comment:

There is a conceptual and factual difference between the credit allocation cap and credit carryforward.

Credit Allocation -- Credit allocation for purposes of the \$10 million cap is a process whereby proposed projects and associated estimated costs are reviewed by the Film Office, and the aggregate \$10 million maximum allowable credit is allocated among the proposed projects that receive Film Office approval based essentially on a first come, first served basis. When the aggregate amount of estimated tax credit associated with approved projects in any one year reaches \$10 million, it is “used up,” and no more projects may be approved by the Film Office until the next succeeding year. When the next year opens, new applications are reviewed, and more projects may be considered within the \$10 million cap for that year; and so on for each year.

Credit Carryover -- Credit carryover, on the other hand, involves utilization of the credit to offset tax liabilities after the proposed project has received a credit allocation

from the Film Office and **after** the Taxpayer has incurred direct qualified production or post production expenses, and gained full entitlement to the tax credit. The Taxpayer may then offset the West Virginia business franchise tax and the West Virginia corporate net income tax beginning in the taxable year when the qualified expenses were incurred. If the Taxpayer does not use up all of the tax credit offsetting the business franchise tax and corporate net income tax or personal income tax in that first taxable year, then the remaining credit that was not used in the first taxable year "carries over" to the next taxable year, and can be used in that second taxable year to offset the Taxpayer's business franchise tax and corporate net income tax or personal income tax liability for that second taxable year.

Specific Responses To Questions

QUESTION: What happens when a taxpayer utilizes their statutory authority to carry forward? If, for example, \$5 million of the credit is used in the first year and \$3 million is carried forward to the second year; **does this \$3 million count against future year's cap?**

RESPONSE: No. The \$3 million carryover does not in any way count against the future year's allocation cap.

QUESTION: The rules do not provide clear guidance in this regard. Additionally, the rules do not provide sufficient guidance in a situation where the cap is reached and a certain percentage of one of the productions' credit will exceed the cap. Let's say in that situation hypothetically, the second production should have received a \$6 million credit but only \$3 million was left in year one's allocation. **Does the remaining \$3 million get credited in the following year and will it apply toward the succeeding year's annual credit cap?**

RESPONSE: No. The remaining \$3 million would not get credited in the following year, and would not apply toward the succeeding year's annual credit cap.

Each allocation year stands on its own. If a project is allocated a specified amount of credit (for example \$1M) pursuant to the first come, first served procedure of the Film Office, then for that year, the maximum amount of tax credit that the project can earn through making qualified expenditures is that specified (per the example \$1M) amount, notwithstanding the fact that more money is spent on the project that would have qualified for the credit. Once the \$10M credit amount is all allocated, applications are no longer considered, and it is necessary for a project sponsor to file a new application in the next year in order to be considered for allocation in that succeeding year.

So, in the context of the example given:

If a production have a projected cost schedule representing a \$6 million tax credit, but only \$3 million was left in year one's allocation, then the Taxpayer is only authorized to take a tax credit in the amount of \$3 million.

The remaining \$3M of project expenditures will **not** be allowable as qualified expenses.

QUESTION: Similarly, what happens if a single qualified production exceeds the \$10 million cap in a particular year? Will the production company receive the remaining credit (which is in excess of the \$10 million) in the succeeding year?

RESPONSE: The production company can only receive a maximum of \$10M in a particular year. The excess would not qualify in the succeeding year.

QUESTION: Will that excess in year 2 count against the second year's \$10 million annual cap?

RESPONSE: The excess would not count against the year 2 cap amount. Each allocation year stands on its own, and the count starts from zero up to the \$10M, and the applications considered are only the applications filed for that year 2 allocation and not prior years applications.

Amendment to the rule:

The distinction between credit carry over versus credit approval under the cap procedures is well understood by most of the tax practitioner community, and is unlikely to cause a practical problem.

The Tax Department has added the following language to the rule in response to the comment.

5.2.d. Each allocation year stands on its own. It is necessary for a project sponsor to file a new application for each year in order to be considered for credit allocation in each specific year. Projects are approved on a first come, first served basis. The maximum amount of project tax credit for any taxable year is the amount allocated by the Film Office through the project review and certification process.

Comment:

Page 6, Section 5.1.c.1 add "Qualified costs incurred prior to the approval of an application are eligible for the incentive if there are tax credits remaining at the time of approval."

Response to Comment: The suggested change has been incorporated into the agency approved rule to read as follows:

5.1.c.1. The eligible company shall submit to the Film Office one (1) complete 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. Qualified costs incurred prior to the approval of an application are eligible for the incentive if there are tax credits remaining within the ten million dollar cap at the time of approval.

Comment:

Page 7, Section 5.1.e. The 180 day rule is excessive for a \$10 million program, only to the extent that it could possibly tie up credits for projects that are not legitimate. In other states, the time period ranges from 90 to 150 days. We would suggest reducing the time period to 90 or 120 days, and extend for good cause (i.e. financing is forthcoming) at the discretion of the film office.

Response to Comment:

The agency approved rule has been amended to read as follows:

Upon award of a tax credit, eligible company must begin production within ~~one hundred eighty (180)~~ one hundred twenty (120) 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.

Comment:

Page 7, Section 5.3.b. – Clarify whether or not the certified public accountant needs to be a “West Virginia” CPA.

Response to Comment:

The suggested change has been incorporated into the agency approved rule to read as follows:

5.3.b. All claims for the tax credit shall be filed with an expense verification report prepared by an independent certified public accountant license to practice in the United States, 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

Comment:

Please define “applicable.” It should mean that the seller must be current on its taxes in order to sell the credits. It should not mean that the current year taxes must be filed prior to

the sale of the credits. In Pennsylvania, "applicable" refers to the year in which the tax credit is issued, and the statute requires that the applicable return be filed and all state obligations thereon be satisfied prior to the sale of credits. Therefore, in Pennsylvania the production company must file its tax return for the year in which the credit issued before a tax credit can be sold. This puts an enormous financial strain on the production company, especially when the tax credit issued in the earlier part of its tax year, in which case the delay can be up to two years. Should the department of revenue require that the "current" year tax return be filed prior to the sale of the credits, this requirement must be communicated to every applicant. They will most likely structure a collapsible special purpose entity to make their picture, in order to facilitate the early filing of its tax return.

Response to Comment:

This comment does not appear to state what part, section or subsection of the rule the commentator is scrutinizing in seeking an interpretation of the word "**applicable**." Without that basic context, it is difficult to respond meaningfully to the comment.

The word "**applicable**" appears 3 times in the rule: In subsection or subdivision 5.3.a, 7.8 and 8.2.

Each is set forth below.

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;

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.

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.

Emphasis added.

Given the three alternative contexts available, we believe the commentator is referring to subdivision 5.3.a.

The term "applicable tax year" as set forth in subdivision 5.3.a. means, the tax year for which tax is owed to the State of West Virginia based on the Taxpayer's nexus with the State of West Virginia, the Taxpayer's presence in West Virginia, or the Taxpayer's activity and transactions in West Virginia, over which the State of West Virginia has taxing jurisdiction.

Use of the term "applicable tax year" does not mean that current year taxes must be filed prior to the sale of the credits.

Rule changes made pursuant to the comment.

The rule has been amended to state that current year West Virginia tax returns need not be filed prior to the transfer of film credit by an eligible transferor.

The rule has been amended to read as follows:

7.4.a. Current year West Virginia tax returns need not be filed prior to the transfer of film credit by an eligible transferor.

Comment:

Page 9, Section 6.4. Accordingly, the film office should maintain a queue and award credits as they become available. Film companies should be allowed to film now and receive credits when they are available, if they otherwise qualify for the program. In many cases, a production company will advance in the queue as other productions drop out. This issue must also carryover to Section 6.4.

Response to Comment:

Language of the rule has not been amended based on this comment because the rule contains sufficient detail to provide result advocated by the commentator.

Comment:

Page 12, Section 7.7. This provision, as we read it, contradicts the statute and we respectfully submit the provision should be amended to reflect the statute section 11-13X-7 subsection (g) of the Code of West Virginia, which reads as follows: (g) 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 exempt from the West Virginia consumers sales and service tax and use tax and from the corporate net income tax and personal income tax.

Section 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~~ exempt from the West Virginia consumers sales and service tax and use tax as a sale or transfer of an intangible, and will not ~~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.~~

Response to Comment:

The correct citation of the West Virginia Code referred to in the comment is W. Va. Code §11-13X-8(g). The suggested change has been incorporated into the agency approved rule.

Comment:

Page 12, Section 7.8. In section 7.8 on the issue of recapture, the language will make it nearly impossible for productions to utilize the WV state tax credit. The rule states that in the event of a transfer "recapture of the credit first falls on the "seller" and then to the "buyer". Before commencement of our production, I created a Corporation in WV to handle the business affairs associated with our film. That corporation will be dissolved the [sic] once the last production transaction is completed (that last transaction will be the sale of the credits). This means, the "buyer" is the only available entity that can be pursued for recapture. It will be impossible to find buyers that are willing to be held accountable for the actions of a business they have no ties to.

Response to Comment:

W. Va. Code §11-13X-8(h) currently provides that "[t]ransferors, and transferees of sold, transferred or assigned tax credits bear joint and several liability for any tax, interest or penalty resulting from recapture, elimination or reduction of a credit claimed pursuant to this article." The rule cannot be amended to conflict with the statute. It is anticipated that legislation to address the Commentator's concerns will be introduced in the 2009 regular session of the West Virginia State Legislature.

Comment:

Page 13, Sections 10 through 11 – The confidentiality of the MPAA member company production data is of critical importance. We appreciate the draft rules discussion regarding the confidential nature of the film data provided by production companies. We understand the need for legislative reporting purposes in the aggregate by the Film Office; however, we respectfully submit the production data should not be made available in response to any general public inquiries. Additionally, the draft rules reference confidentiality of documents, except as provided in [W. Va. Code] 11-10-5d, which references 'persons having material interest.' It is not clear who exactly would have material interest in certain proprietary

production data or other application information as we do not know who qualifies as a 'person having a material interest.'"

Response to Comment:

By statute (West Virginia Code §11-10-5d(f), the only person or entity to whom confidential tax information may be disclosed under the "person having a material interest" statutory language is an entity designated by the Tax Commissioner in a legislative rule, which rule is, by statute, required to be reviewed and authorized by the Legislative Rule Making Review Committee, and authorized by statute as a legislative rule by vote of the West Virginia Legislature. The only entity so designated is the Film Office, because the Film Office must use tax data for purposes specified in the film credit statute. Under West Virginia Code § 11-10-5d, unauthorized disclosure of tax returns or tax information is subject to criminal penalties comprised of a fine up to \$1,000.00, or imprisoned for up to 1 year, or both, for each offense.

To the extent that production data is reported for the purposes of documenting a tax credit, that information would be held as confidential by law, and would not be made available in response to any general public inquiries. Such information is also exempt from Freedom Of Information Act requests under determinations of the West Virginia Supreme Court set forth in *Daily Gazette Co. v. Caryl*, 181 W. Va. 42, 380 S.E.2d 209 (1989); *State ex rel. Caryl v. MacQueen*, 182 W. Va. 50, 385 S.E.2d 646 (1989).

The statute addressing tax information confidentiality clearly addresses the commentator's concerns, and provides the safeguards advocated by the commentator. Therefore, no amendment to the rule has been made in response to the comment.

Comment:

Finally, we would like to provide comments on the attached "Eligibility Application" although the state did not ask for public comments on this document. Our concerns are as follows: on page 3 of the application it asks for phone and Emails for the producers and directors. This is an obscure request and we suggest the only detailed contact information needed is a primary and secondary contact and the tax credit contact. We would suggest any additional personal contact information for other production executives by provided to the state only upon approval of the particular production employee.

Response to Comment:

Since the "Eligibility Application" form is not part of 110 C.S.R. Series 13X no response is necessary.

Judy Cooper

From: Martin, Delores [dmartin@tax.state.wv.us]
Sent: Tuesday, September 02, 2008 11:48 AM
To: Judy Cooper
Cc: Morton, Mark
Subject: Spam:FW: Public Comment rec'd for film credit legislative rule 110 CSR 13X

Attachments: MX-3501N_20080829_103447.pdf



MX-3501N_200808
29_103447.pdf (...)

Ms. Cooper:

The Legal Section of the West Virginia Tax Department responds to public comments on legislative rules relating to our department. My department, of course, is under the authority of the West Virginia Department of Tax and Revenue. As an attorney for the Tax Department, I was assigned to respond to public comments on 110 C.S.R. Series 13X, the West Virginia Film Credit Investment Act. The deadline for submitting public comments to the Tax Department on the proposed rule was Friday, August 29, 2008 at 10:00 a.m. On Friday, August 29, 2008 I filed with the WV Secretary of State the proposed legislative rule. My filing did not include responses to the attached public comments. Prior to filing the proposed rule, at approximately 3:00 p.m. on Friday, August 29, 2008, but subsequent to compiling the original rule and sixteen copies in preparation for filing with your office, I became aware of the attached comments. Upon telephoning my office, the Legal Section of the WV Tax Department, I was informed by a paralegal that a copy of additional public comments relating to the rule had been received by the Legal Section of the West Virginia Tax Department at approximately 2:00 p.m. After consulting with Maureen Lewis about the effect, if any, the new public comments might have on my ability to file 110 C.S.R. 13X, I was advised by Ms. Lewis that it was not necessary to respond to comments received after the Friday, August 29, 2008, 10:00 a.m. deadline. I subsequently went ahead and filed the proposed rule.

This morning, Monday, September 2, 2008 I received an e-mail from my supervisor, Mark Morton, General Counsel, West Virginia Tax Department, wherein he forwarded to me an e-mail sent to him from Carol Nichols, an employee of West Virginia Department of Tax and Revenue, Cabinet Secretary Virgil Helton, advising Mr. Morton that public comments (see attached) regarding 110 C.S.R. Series 13X, the West Virginia Film Industry Investment Act had been received in Cabinet Secretary Helton's office on Thursday, August 28, 2008, and came to her attention on Friday, August 29, 2008. Unfortunately Mr. Morton was out of the office the entire day of Friday, August 29, 2008 and did not become aware of Ms. Nichols e-mail until this morning. He immediately forwarded the e-mail to me. Hence, today is when I first became aware that the attached public comments were received by Cabinet Secretary Virgil Helton on Thursday, August 28, 2008.

My question is -- does the fact that the attached public comments were received by the West Virginia Department of Tax and Revenue but not the West Virginia Tax Department prior to the deadline have any effect on the validity of the rule as filed?

-----Original Message-----

From: Morton, Mark
Sent: Tuesday, September 02, 2008 9:58 AM
To: Martin, Delores
Subject: FW: Public Comment rec'd for film credit legislative rule 110 CSR 13X

-----Original Message-----

From: Nichols, Carol
Sent: Friday, August 29, 2008 10:20 AM

To: Morton, Mark
Cc: Casto, Adam
Subject: Public Comment rec'd for film credit legislative rule 110 CSR 13X

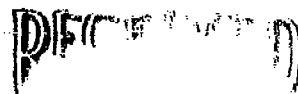
This was received by the Cabinet Secretary's Office yesterday - was on my desk this morning.

Please review and let us know if this changes anything.

Thanks
<<MX-3501N_20080829_103447.pdf>>



Cast & Crew
Entertainment Services, LLC



AUG 28 2008

SECRETARY OF
REVENUE

August 25, 2008

Virgil T. Helton
Legal Division
State Tax Department
P.O. Box 1005
Charleston, WV 25324-1005

Joe Bessacini
Cast & Crew Entertainment, LLC
100 East Tujunga Ave 2nd Floor
Burbank, CA 91502
818-480-4427

Dear Virgil T. Helton:

The tax professionals at Cast & Crew, a leading entertainment payroll company, are routinely called upon to comment on proposed legislation, rules and regulations, with regard to film production incentives. We have over 27 years of tax related experience in the film entertainment industry. Over the years, we have developed strong relationships with the U.S. film offices, departments of revenue, and taxation. Our clients range from the largest major studios to the independent producer.

Here are our comments on the proposed rules for the West Virginia Film Industry Investment Act.

Sec 110-13X-2.3.a – Line 1, after wages, delete “fringe benefits” and, after the word fees insert “and costs for related fringe benefits provided...” Note that fringe benefits are not paid to the worker. These costs, such as, pension, health plan insurance, workers compensation, FICA, etc. are paid to various private/government entities on behalf of the workers.

Sec 110-13X-2.3.b.1 & b.2 – Please clarify what “subject to West Virginia income tax” means. It seems that any payment made to a company providing services in West Virginia is “subject to West Virginia income tax”. All monies earned in West Virginia are “subject to income tax”. These provisions are very similar to the New Mexico legislation but West Virginia should define what they mean for West Virginia. Is the personal service corporation required to show that it is registered to do business in West Virginia?

Sec 110-13X-2.6 - line 3, after production company, insert “or payroll services corporation”

Sec 110-13X-2.10 – Clarify that if the full time employee threshold is met during principal production then the additional 4% allowed under Sec 11-13X-5(b), of the legislation, applies to all costs and not just the costs during principal production. If this is not a correct interpretation, please clarify.

Sec 110-13X-3.3.b.1 - line two, after residents insert “during principal production”.

Sec 110-13X-5.1.c.1 add “Qualified costs incurred prior to the approval of an application are eligible for the incentive if there are tax credits remaining at the time of approval.”

Sec 110-13X-5.1e – line two, replace one hundred eighty (180) days and replace with “ ninety (90) days (an additional ninety (90) days may be awarded for good cause)”. Note that 180 days is too long to tie up your limited funds without any activity.

.....



Cast & Crew[®]
Entertainment Services, LLC

Sec 110-13X-5.3b -- Clarify whether or not the certified public accountant needs to be a "West Virginia" CPA.

There is some troubling language in the legislation that the rules cannot change. This centers on the recapture provisions. Currently, the legislation indicates that both transferors and transferees of sold, transferred, or assigned credits bear joint and several liability for any tax, interest or penalty. Very few corporations will purchase tax credits subject to recapture. If they do, it will be at a steep discount. How does this affect West Virginia? If the producer can only monetize 80% of the 27% tax credit, the real value to the producer is a credit equal to 21.6%. This haircut may be just enough the sway the producer to film in another state.

Thank you for the opportunity to comment on the proposed rules. If you have any questions please don't hesitate to contact me.

Warm Regards,

A handwritten signature in black ink, appearing to read "Joe Bessacini". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Joe Bessacini