

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

Form #2

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**FILED**

2008 JUL 16 PM 2:23

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE**

AGENCY: West Virginia Development Office TITLE NUMBER: 145

RULE TYPE: Procedural CITE AUTHORITY: W.Va. Code §5B-2-3

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 7

TITLE OF RULE BEING AMENDED: Neighborhood Investment Program Act

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON August 16, 2008 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

West Virginia Development Office

Bldg. 6, Room 553

Charleston, WV 25305-0311

Att: Ralph Goolsby

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

  
Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

\$6.00

## NEIGHBORHOOD INVESTMENT PROGRAM ACT

Changes reflect the extension of the program to 2011 and the increase of the tax credit from \$2.0 million to \$2.5 million. Both changes are consistent with committee sub for HB 4357 which was approved by the legislature and signed by Governor Manchin.

APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: Neighborhood Investment Program Act (NIP)

Type of Rule:  Legislative  Interpretive  Procedural

Agency: West Virginia Development Office

Address: State Capitol Complex Building 6, Room 553, Charleston, West Virginia 25305

Phone Number: 304-558-2234 Email: rgoolsby@wvdo.org

**Fiscal Note Summary**

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

The stated purpose is to extend Neighborhood Investment Program Act, and eligibility for tax credits under the act, until July 1, 2011 and to increase the ceiling to \$2.5 million. The extension of the Neighborhood Investment Program and the resultant tax credits, will increase the ceiling of the program from \$2 million to \$2.5 million per year tax credit program for qualified neighborhood investment. This will result in a reduction in the General Revenue Fund of up to \$2.5 million per year for a three-year period. Based upon the likely filing periods for tax returns claiming a tax credit attributable to approvals made during the proposed extension period, the revenue reduction would likely occur in fiscal years 2010, 2011, and 2012.

**Fiscal Note Detail**

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

| <b>FISCAL YEAR</b>                 |   |                                      |   |
|------------------------------------|---|--------------------------------------|---|
| Effect of Proposal                 | Current Increase/Decrease<br>(use "--") | Next Increase/Decrease<br>(use "--") | Fiscal Year<br>(Upon Full Implementation) |
| <b>1. Estimated Total Cost</b>     |   |                                      |   |
| Personal Services                  |   |                                      |   |
| Current Expenses                   |   |                                      |   |
| Repairs & Alterations              |   |                                      |   |
| Assets                             |   |                                      |   |
| Other                              |   |                                      |   |
| <b>2. Estimated Total Revenues</b> |   |                                      | <b>2,500,000.00</b>                       |

Rule Title: \_\_\_\_\_

Rule Title: Neighborhood Investment Program Act (NIP)

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

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

The extension of the Program and the resultant tax credits, of the \$2.5 million per year tax credit program for qualified neighborhood investment would result in a reduction in the General Revenue Fund of up to \$2.5 million per year for a three-year period. Based upon the likely filing periods for tax returns claiming a tax credit attributable to approvals made during the proposed extension period, the revenue reduction would likely occur in fiscal years 2010, 2011 and 2012.

The Legislature requires that program participants pay a 3% certification fee for each donation for which tax credit is issued. These fees support costs associated with program administration. The maximum eligible contributions in any year cannot exceed \$5 million. Therefore, the collection of certification fees cannot exceed \$150,000 each year.

**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.

n/a

Date: 7/16/08

Signature of Agency Head or Authorized Representative

*Felicia M. Jones*

TITLE 145  
PROCEDURAL RULE  
WEST VIRGINIA DEVELOPMENT OFFICE

SERIES 7  
NEIGHBORHOOD INVESTMENT PROGRAM ACT

FILED  
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SECRETARY OF STATE

§145-7-1. General.

1.1. Scope. -- These rules implement the Neighborhood Investment Program Act found at W. Va. Code §11-13j-1 et seq.

1.2. Authority. -- W. Va. Code §5B-2-3.

1.3. Filing Date. -- July 16, 2008.

1.4. Effective Date -- August 18, 2008.

§145-7-2. Application and Enforcement.

2.1. Application - These rules shall apply to the West Virginia Development Office, the Neighborhood Investment Program Advisory Board and to all persons submitting applications pursuant to the Neighborhood Investment Program Act.

2.2. Enforcement - The enforcement of this rule shall be vested with the executive director of the West Virginia Development Office.

§145-7-3. Definitions.

3.1. Affiliate - The terms "affiliate" or "affiliates" include all concerns which are affiliates of each other when either directly or indirectly one concern controls or has the power to control the other or a third party or third parties control or have the power to control both. In determining whether concerns are independently owned and operated and whether or not affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management and contractual relationships.

3.2. Capacity Building - The term "capacity building" means to generally enhance the capacity of the community to achieve improvements and to obtain the community services described in subsections 3.4.1. through

3.4.5. of these rules. Capacity building includes, but is not limited to, improvement of the means or capacity to:

3.2.1. Access, obtain and use private, charitable and governmental assistance programs, administrative assistance, and private, charitable and governmental resources or funds;

3.2.2. Fulfill legal, bureaucratic and administrative requirements and qualifications for accessing assistance, resources or funds; and

3.2.3. Attract and direct political and community attention to needs of the community for the purpose of increasing access to and use of assistance, resources or funds for a given purpose, goal or need.

3.3. Commissioner or tax commissioner - The terms "commissioner" and "tax commissioner" are used interchangeably in these rules and mean the tax commissioner of the State of West Virginia or his or her designee.

3.4. Community Services - "Community services" means any of the following services provided at no charge whatsoever:

3.4.1. Any type of health, personal finance, psychological or behavioral, religious, legal, marital, educational or housing counseling and advice to economically disadvantaged citizens or a specifically designated group of economically disadvantaged citizens, or in an economically disadvantaged area;

3.4.2. Emergency assistance or medical care to economically disadvantaged citizens or to a specifically designated group of economically disadvantaged citizens, or in an economically disadvantaged area;

3.4.3. The establishment, maintenance or operation of recreational facilities or housing

facilities for economically disadvantaged citizens, a specifically designated group of economically disadvantaged citizens, or in an economically disadvantaged area;

3.4.4. Economic development assistance to economically disadvantaged citizens or a specifically designated group of economically disadvantaged citizens without regard to whether they are located in an economically disadvantaged area, or to individuals, groups or neighborhood or community organizations in an economically disadvantaged area; or

3.4.5. Community technical assistance and capacity building to economically disadvantaged citizens, a specifically designated group of economically disadvantaged citizens, or to individuals, groups or neighborhood or community organizations in an economically disadvantaged area.

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

3.6. Control - The term "control," with respect to a corporation, means ownership, directly or indirectly, of stock possessing fifty percent or more of the total combined voting power of all classes of the stock of such corporation which entitles its owners to vote. With respect to a trust, "control" means ownership, directly or indirectly, of fifty percent or more of the beneficial interest in the principal or income of such trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association or of a beneficial interest in a trust shall be determined in accordance with the rules for constructive ownership of stock provided in Section 276(c), other than paragraph (3) of such section, of the United States Internal Revenue Code, as amended.

3.7. Corporation - The term "corporation" means any corporation, joint-stock company or association, or any business conducted by a trustee or trustees wherein interest or ownership is evidenced by a certification of interest or

ownership or by some similar written instrument.

3.8. Crime Prevention - "Crime prevention" means any activity which aids in the reduction of crime.

3.9. Designee - The term "designee" or "his or her designee," when used in reference to the tax commissioner, means any officer or employee of the Tax Division of the Department of Tax and Revenue duly authorized by the tax commissioner, either directly or indirectly to perform the functions mentioned or described in these rules.

3.10. Development Office - The term "Development Office" means the West Virginia Development Office established by W. Va. Code §5B-1-1 et seq.

3.11. Director or director of the West Virginia Development Office - The term "director" or "director of the West Virginia Development Office" means the executive director of the West Virginia Development Office.

3.12. Economically disadvantaged area.

3.12.1. In a municipality, the term "economically disadvantaged area" is an area that does not exceed fifteen square miles, contains a portion of an incorporated municipality and the aggregate poverty rate of persons residing in the area, based upon the most recent decennial census, is at least one hundred twenty-five percent of the statewide poverty rate.

3.12.2. In a rural area the term "economically disadvantaged area" is an area that does not exceed twenty-five square miles, is located in a rural area and which contains no incorporated municipality or portion thereof, and the aggregate poverty rate of persons residing in the area, based upon the most recent decennial census, is at least one hundred twenty-five percent of the statewide poverty rate.

3.12.3. An economically disadvantaged area shall be qualified only upon proper certification issued by the Development Office.

Certifications issued by the Development Office shall expire after five calendar years after such certification unless specifically limited to a shorter time by specific order of the Development Office. No area shall hold the status of a certified economically disadvantaged area for a period of time greater than ten years, either consecutively or in the aggregate.

3.12.4. In the event that the Development Office elects to certify an area as an economically disadvantaged area, the certification will be made on the basis of the poverty criteria identified in subsections 3.12.1 or 3.12.2 of these rules.

3.12.5. No economically disadvantaged area may be certified within twenty-five miles of any other certified economically disadvantaged area. Not more than six economically disadvantaged areas may hold the status of certified economically disadvantaged areas at any given time.

3.12.6. At least a majority of economically disadvantaged areas at any given time will be located in rural areas.

3.12.7. The certification of an economically disadvantaged area shall be filed with the Secretary of State and will specifically set forth the boundaries of the economically disadvantaged area by both description and map, the date of certification of the area as an economically disadvantaged area, the date on which certification will terminate and a statement of the director's findings as to the aggregate poverty rate of persons residing in the certified economically disadvantaged area.

3.13. Economically disadvantaged citizen - The term "economically disadvantaged citizen" means a natural person who is a domiciliary and resident of this state that had an annual gross personal income not exceeding one hundred twenty-five percent of the federal designated poverty level for personal incomes during the current taxable year or during the immediately preceding taxable year.

3.14. Education - "Education" means scholastic instruction to, or scholarship by, an individual that enables such individual to

prepare for better life opportunities. Education does not include courses in physical training, physical conditioning, physical education, sports training, sports camps and similar training or conditioning courses except for physical therapy prescribed by a physician or other person licensed to prescribe courses of medical treatment under West Virginia law.

3.15. Eligible Contribution - An eligible contribution consists of cash, publicly traded common or preferred stock representing ownership in a corporation, tangible personal property valued at its fair market value, real property valued at its fair market value or a contribution of in-kind professional services valued at seventy-five percent of fair market value. For purposes of this definition, the value of in-kind professional services will not qualify as an eligible contribution unless the services are: reasonably priced and valued; reasonably necessary services customarily and normally provided by the contributor in the normal course of business to customers, clients or patients other than those encompassed by the project plan; not reimbursable, in whole or in part, from sources other than the tax credit provided under this article; and are services which are not available without cost elsewhere in the community. Common or preferred stock contributions to a project transferee must be sold by the project transferee within one hundred eighty days of its receipt.

3.15.1. The term "professional services" means only those services provided directly by a state licensed physician, dentist, lawyer, certified public accountant, public accountant, architect, registered nurse, licensed practical nurse, dental hygienist, or other health care professional.

3.15.2. Minimum contribution - No contribution of cash, stock, property or professional services or any combination thereof contributed in any tax year by any taxpayer having a fair market value of less than five hundred dollars qualifies as an eligible contribution.

3.15.3. Maximum contribution - No portion of a contribution of cash, stock, property or professional services or any combination

thereof contributed in any tax year by any taxpayer having a fair market value in excess of two hundred thousand dollars qualifies as an eligible contribution.

3.15.4. Limitations - Not more than twenty-five percent of total eligible contributions to a certified project may be in-kind contributions. Not more than twenty-five percent of total eligible contributions made by any taxpayer to a certified project may be in-kind contributions.

3.16. Eligible Taxpayer - The term "eligible taxpayer" means a person subject to the taxes imposed by W. Va. Code §§11-21, 23, or 24 that makes an eligible contribution to a qualified charitable organization pursuant to the terms of a certified project plan for the purpose of providing neighborhood assistance, community services, or crime prevention, or for the purpose of providing job training or education for individuals not employed by the contributing taxpayer or a person related to the contributing taxpayer. "Eligible taxpayer" also includes an affiliated group of taxpayers if the group elects to file a consolidated corporation or net income tax return and if at least one affiliate in the affiliated group would qualify as an eligible taxpayer as defined in the preceding sentence.

3.17. Fair market value - The term "fair market value" shall mean:

3.17.1. As it relates to in-kind professional medical services, it shall be the value of the procedure as published in reimbursement guides for medical professionals as published by the West Virginia Public Employees Insurance Agency.

3.17.2. As it relates to in-kind legal, accounting, or architectural services, it shall be the reimbursement rates for attorneys in court-appointed cases in criminal matters as established in W. Va. Code §29-21-13a.

3.17.3. As it relates to tangible personal property, it shall be the Internal Revenue Service definition of a charitable personal property contribution.

3.17.4. As it relates to real property, with the exception of farms receiving farm use valuation and managed timberland, it shall be the fair market value as determined for property tax purposes. The exception categories shall be valued at the property's current market value.

3.17.5. As it relates to publicly traded common or preferred stock representing ownership in a corporation, it shall be the value of the stock at the average price between the highest and lowest quoted selling prices on the date of transfer to the project transferee.

3.18. Includes and including - The terms "includes" and "including," when used in a definition contained in this article, will not be deemed to exclude other things otherwise within the meaning to the term defined.

3.19. Job training - "Job training" means instruction for an individual that enables them to acquire vocational skills that will assist them in becoming employable or enable them to seek a higher grade of employment.

3.20. Natural person or individual - The term "natural person" and the term "individual" mean a human being. The terms "natural person" and "individual" do not mean and specifically exclude any corporation, limited liability company, partnership, joint venture, trust organization, association, agency, governmental subdivision, syndicate, affiliate or affiliation, group, unit or any entity other than a human being.

3.21. Neighborhood Assistance - "Neighborhood Assistance" means either:

3.21.1. The furnishing of financial assistance, labor, material or technical advice that aids in the physical or economic improvement of a part or all of an economically disadvantaged area; or

3.21.2. The furnishing of technical advice that promotes higher employment in an economically disadvantaged area.

3.22. Neighborhood organization - "Neighborhood organization" means an organization that performs community services,

as defined in these rules, and is exempt from income taxation under section 501(c)(3) of the Internal Revenue Code.

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

3.24. Person - The term "person" includes any natural person, corporation, limited liability company or partnership.

3.25. Project transferee - The term "project transferee" means any neighborhood organization, qualified charitable organization or other organization, entity or person that receives an eligible contribution or part of an eligible contribution from an eligible taxpayer for the purpose of directly or indirectly providing neighborhood assistance, community services, or crime prevention, or for the purpose of providing job training, education or other services or assistance pursuant to a project plan. The project transferee is typically the first entity or person receiving eligible contributions from eligible taxpayers under a project plan. However, in the case of eligible contributions of in-kind services or other eligible contributions or portion thereof made pursuant to a certified project plan directly to indigent, disadvantaged or needy persons, economically disadvantaged citizens, or other persons or organizations under the sponsorship or auspices of any neighborhood organization, qualified charitable organization or other organization, entity or person as a certified project participant, the eligible contributions will be deemed to have been made to the entity, organization or person under whose sponsorship or auspices the eligible contributions are made, and that entity, organization or person is deemed to be the project transferee with relation to those eligible contributions. The project transferee is the entity, organization or person that is liable under this article for payment of the project certification fee to the Development Office. The term project transferee means and includes any

deemed project transferee under the provisions of these rules.

3.26. Qualified charitable organization - The term "qualified charitable organization" means a neighborhood organization, as defined in section 3.21. of these rules, which is the sponsor of a project that has received certification by the director of the Development Office pursuant to the requirements of these rules. No organization may qualify as a qualified organization under these rules if the organization is not registered with the state as required under the solicitation of charitable funds act.

3.27. Related person - The term "related person" or "person related to" a stated taxpayer means:

3.27.1. An individual, corporation, partnership, affiliate, association or trust or any combination or group thereof controlled by the taxpayer; or

3.27.2. An individual, corporation, partnership, affiliate, association or trust or any combination or group thereof that is in control of the taxpayer; or

3.27.3. An individual, corporation, partnership, affiliate, association or trust or any combination or group thereof controlled by an individual, corporation, partnership, affiliate, association or trust or any combination or group thereof that is in control of the taxpayer; or

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

3.28. State Fiscal Year - "State fiscal year" means a twelve-month period beginning on the first day of July and ending on the thirtieth day of June.

3.29. Taxpayer - The term "taxpayer" means any person subject to the taxes imposed by W. Va. Code §§11-21, 23 or 24.

3.30. Technical assistance - The term "technical assistance" means assistance in understanding, using and fulfilling the legal, bureaucratic and administrative requirements

and qualifications which must be negotiated for the purpose of effectively accessing, obtaining and using private, charitable, not-for-profit or governmental assistance, resources or funds, and maximizing the value thereof. The term "technical assistance" also means assistance provided by any person holding a license under West Virginia law to practice any licensed profession or occupation, whereby such person, in the practice of such profession or occupation, assists economically disadvantaged citizens or the persons in an economically disadvantaged area by:

3.30.1. Providing any type of health, personal finance, psychological or behavioral, religious, legal, marital, educational or housing counseling and advice to economically disadvantaged citizens or a specifically designated group of economically disadvantaged citizens, or in an economically disadvantaged area;

3.30.2. Providing emergency assistance or medical care to economically disadvantaged citizens or to a specifically designated group of economically disadvantaged citizens, or in an economically disadvantaged area;

3.30.3. Establishing, maintaining or operating recreational facilities or housing facilities for economically disadvantaged citizens, a specifically designated group of economically disadvantaged citizens, or in an economically disadvantaged area;

3.30.4. Providing economic development assistance to economically disadvantaged citizens or a specifically designated group of economically disadvantaged citizens without regard to whether they are located in an economically disadvantaged area, or to individuals, groups or neighborhood or community organizations in an economically disadvantaged area; or

3.30.5. Providing community technical assistance and capacity building to economically disadvantaged citizens, a specifically designated group of economically disadvantaged citizens, or to individuals, groups or neighborhood or community organizations in an economically disadvantaged area.

#### **§145-7-4. Neighborhood Investment Program Advisory Board.**

4.1. Composition of the Board. The Neighborhood Investment Program Advisory Board shall consist of thirteen members - the director of the Development Office plus twelve members appointed by the director. The director shall serve as chair but shall not vote unless it is necessary to break a tie. Four board members will be officers or members of boards of directors of unrelated corporations which are currently licensed to do business in West Virginia. Four board members will be executive directors, officers or members of boards of directors of unrelated not-for-profit organizations which currently hold charitable organization status under section 501(c)(3) of the Internal Revenue Code and which are currently licensed to do business in West Virginia. Four board members will be economically disadvantaged citizens of the State. An appointee shall be considered an economically disadvantaged citizen of this State if, in the taxable year immediately preceding appointment to the board, he or she had an annual gross income that is not more than 125 percent of the federal designated poverty level for personal incomes, and who has been domiciled in and a resident of this State for at least one year at the time of his or her appointment. A board member appointed to represent economically disadvantaged citizens may serve out his or her term of original appointment even if his or her income in a subsequent taxable year exceeds 125 percent of the federal designated poverty level. No more than four of the twelve appointed members may be from the same Congressional District and no more than seven of the appointed members may be from the same political party. Members are eligible for reappointment, but no member may serve more than three consecutive terms.

4.2. Terms of Board Members. Except for initial appointments, board members shall be appointed for three years. Appointments shall begin the 1st day of July in the year of appointment and end the 30th day of June of the third calendar year following the calendar year in which the appointment took effect. Initial appointments shall be as follows: Four of the

initial appointments shall be for a term of one year, four initial appointments shall be for a term of two years, and four initial appointments shall be for a term of three years. The three categories of board members will be represented in each term class appointed. Appointments to fill unexpired terms shall be for the duration of the term. Members shall be eligible for reappointment, but shall not serve more than three consecutive terms.

4.3. Meetings. The board shall meet at least four times during each fiscal year provided that no meeting of the board shall be required if the total amount of tax credits available for the fiscal year have been allocated. Additional meetings may be held upon the call of the chairperson or by a written request to the chairperson by a majority of the members. Seven members of the board, including the chairperson, shall constitute a quorum for the transaction of business. The board shall elect from among its members a vice chair and a secretary. These officers shall serve two year terms and are eligible for reelection.

4.4. Annual Report. The Board shall submit an annual report to the Governor and to the Legislature within thirty days after the close of each fiscal year beginning with Fiscal Year 1997. The annual report shall include summaries of all meetings of the Board; an analysis of the overall progress of the program; a discussion of fiscal concerns, if any; the relative impact the program is having on the State; and any suggestions and policy recommendations of the Board. Beginning on the fifteenth day of December 2005, and every second year thereafter, the Director of the West Virginia Development Office shall also secure an independent review of the program and present the findings to the Joint Committee on Government and Finance.

#### 4.5. Duties of the Board.

4.5.1. The Board shall select and approve projects which may be certified by the director. Only projects sponsored by a qualified charitable organization may be approved by the Board and certified by the director. An applicant that does not hold current status as a charitable organization under section 501(c)(3)

of the Internal Revenue Code may not receive project approval from the Board or project certification from the director for any proposed project. A copy of the applicant's certification as a 501(c)(3) organization must be submitted with the application.

4.5.2. Board members shall not be prohibited from being involved in fund raising activities of any charitable organization for which they serve as a member of the board or as an officer. The member must, however, recuse himself or herself from board participation if they serve as a member of the board or as an officer of a project sponsor under consideration by the Board.

4.6. Criteria for Evaluating Proposed Project Plans. In evaluating projects for approval, the Board shall give priority to projects based upon the following criteria:

4.6.1. Whether the project is community based. A project is community based if it will be managed locally without national, state, multi-state or international affiliations; the project will benefit local citizens in the immediate geographic area where the project is to operate; and the sponsor of the project is a local entity rather than a statewide, national or international organization or an affiliate of a state wide, national or international organization;

4.6.2. The proposed project will primarily serve low income persons;

4.6.3. The proposed project will serve highly stressed neighborhoods or communities;

4.6.4. The project incorporates collaborative partnerships among nonprofit groups, businesses, government organizations and other community organizations;

4.6.5. The applicant or sponsor of the project has demonstrated a proven capacity to deliver the proposed services;

4.6.6. The applicant or sponsor of the project has a history of fundraising activity and historically maintains low administrative costs;

4.6.7. The applicant produces a strong showing of need for the services which the proposed project would provide, and produces convincing documentation of that need; and

4.6.8. The proposed project is innovative, novel, creative or unique in program approach.

4.7. Conflict of Interest. If an applicant for project certification is directly or indirectly affiliated with one or more Board members, those members may discuss the proposals with the Board, but may not vote when the project is considered for final approval or disapproval by the Board.

#### 4.8. Project Approval.

4.8.1. Proposed projects must be approved by majority vote of those members present taken after competitive comparison of projects under consideration. All complete and valid applications received at least ten business days prior to the next regular meeting of the Board must be considered at the next regular meeting and at such continuing meetings of the Board as may be necessary to dispose of its business in a timely manner. At its sole discretion, the Board may consider applications at special or interim meetings.

4.8.2. The Board reserves the right to approve less than the full amount of credits requested by the project transferee in their application. If the amount awarded by the Board is less than the full amount sought by the project transferee, the Board may also approve a supplemental amount of credits to become available on or after March 31 of the state fiscal year if sufficient credits remain unallocated as of that date or if credits have been returned from previously approved projects: Provided, that the project transferee receiving supplemental credit approval shall, on or before March 15 of the state fiscal year, have issued (or have sufficient written documentation to show the clear intent of a donor to contribute) ninety percent or more of the credits they were initially awarded. For purposes of project certification by the director in accordance with subsection 4.9.1 of these rules, projects approved under 4.8.1 and eligible for supplemental credits shall be deemed

approved by the Board for receipt of supplemental credits on March 31 of the state fiscal year in which they were considered.

4.8.3. If the Board approves supplemental credits to more than one project transferee, the Board shall competitively rank the projects receiving supplemental credit approval and, if the project transferee has met the requirements of Section 4.8.2, credits available on or after March 31 of the state fiscal year shall be made available by the director of the Development Office in the order projects were competitively ranked by the Board. Credits will be made available by the director until such time as the full amount of available credits has been awarded.

4.8.4. Project transferees may return credits to the Development Office that they do not anticipate using in the state fiscal year in which they were awarded. Project transferees that have issued less than seventy percent of their authorized credits prior to March 15 of the state fiscal year in which they were awarded, and do not have sufficient written documentation to show the clear intent of a donor to contribute, may be directed by the director of the Development Office to return a percentage of the credits previously authorized by the Board. Organizations issuing between forty-five and sixty-nine percent of their authorized credits prior to March 15 of the state fiscal year may be directed to return up to twenty-five percent of the credits previously awarded by the Board. Organizations issuing between one and forty-four percent of their authorized credits prior to March 15 of the state fiscal year may be directed to return up to fifty percent of the credits previously awarded by the Board. Organizations issuing zero percent of their authorized credits prior to March 15 of the state fiscal year may be directed to return up to one hundred percent of the credits previously awarded by the Board.

#### 4.9. Project Certification by Director.

4.9.1. Upon approval of a project by the Board, the project shall be submitted to the director of the Development Office. Within sixty days after the close of any regular meeting of the Board, the director must certify or deny certification of all proposed projects considered

by the Board since the preceding regular meeting; provided, however, that the Board may defer consideration of an application for the purpose of obtaining additional information about the project or applicant. If additional information is requested by the Board related to any application, the application shall remain eligible for consideration at the next regularly scheduled meeting of the Board. Applications for which additional information is not requested and which are not certified by the director within the 60 day period are deemed disapproved by operation of law. All applications filed in any state fiscal year and not certified during the fiscal year in which they are filed are null and void on the last day of that fiscal year and a new application for project certification must be filed with the Development Office on or after the 1st day of July of the next fiscal year.

4.9.2. No certification may be issued for any project, even if approved by the Board, if the issuance of certification for the project will cause the aggregate amount of tax credits certified to exceed the limitation of \$2.5 million per state fiscal year. If tax credits are returned by a project transferee pursuant to subsection 4.8.4 of these rules, the director may reissue certification for those credits returned. No certification of a project may be issued by the director for any project that was not approved by the Board. The Development Office must promptly notify applicants of the issuance of certification for their project and issue tax credit vouchers to certified project applicants in the amount of the tax credit represented by the project.

4.10. Transferee Reports. Project transferees shall file a quarterly report with the Development Office on the progress of their certified project. The reports shall be filed in a form approved by the director.

4.11. Quarterly Reports. The director shall report quarterly to the Board on the progress of certified projects and on the program generally.

**§145-7-5. Certification of Economically Disadvantaged Areas.**

5.1. Certification. The director of the Development Office may, at his discretion,

certify up to six areas in West Virginia as economically disadvantaged areas based on the following criteria:

5.1.1. The aggregate poverty rate of persons residing in the area is at least one hundred and twenty-five percent of the statewide poverty rate as determined by the most recent decennial census.

5.1.2. A majority of all economically disadvantaged areas holding designations as economically disadvantaged areas at any one time shall be located in rural areas.

5.1.3. No area may be certified as an economically disadvantaged area if it is located within 25 miles of any other certified economically disadvantaged area.

5.2. Determination of areas. Areas will be certified as economically disadvantaged based on current indices of social and economic conditions which include, but are not limited to, the poverty rate of the area in relation to the aggregate poverty rate of the State of West Virginia or the standard metropolitan statistical area in which the economically disadvantaged area is located.

5.3. Filing of certification order. The certification order of the Development Office will be filed with the Secretary of State and shall:

5.3.1. Specifically set forth the boundaries of the economically disadvantaged area, by both description of its boundaries and its map location;

5.3.2. State the date on which the area was certified as an economically disadvantaged area;

5.3.3. State the date on which the certification will end; and

5.3.4. Include a statement of the director's findings as to the aggregate poverty level of residents living in the certified economically disadvantaged area.

5.4. Duration of certification order. Certifications shall last for a period of five

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calendar years unless a shorter period of time is specified in the certification order issued by the Development Office. An area may be recertified as an economically disadvantaged area, but the total period of time an area is certified may not exceed ten years.

#### §145-7-6. Certification of Project Plans.

6.1. A neighborhood organization that seeks to sponsor a project and have it certified pursuant to these rules must submit their application to the director of the Development Office on forms approved by the director. The application shall include, but not be limited to, the following information:

6.1.1. A description of the project to be implemented;

6.1.2. The identity of the economically disadvantaged area or areas to be assisted by the project, or the economically disadvantaged citizens to be assisted, or a specifically designated group of economically disadvantaged citizens to be assisted by the project;

6.1.3. The amount of total tax credits requested by the proposed project pursuant to receipt of eligible contributions from eligible taxpayers;

6.1.4. The amount of total estimated eligible contributions to be received under the project plan; and

6.1.5. The schedule for implementing the project.

6.2. The Development Office shall record the time of filing of each application for certification.

6.3. All applications filed with the Development Office are public information, whether the project is certified or denied certification. At the sole discretion of the Development Office, applications may be published.

#### §145-7-7. Project Certification Fee.

7.1. Project transferees that receives eligible contributions pursuant to a certified project plan must remit to the Development Office a project certification fee equal to 3 percent of the total eligible contributions received pursuant to the certified project plan.

7.2. When the eligible contribution consists of in-kind services or contributions made directly to indigent, disadvantaged or needy persons, economically disadvantaged citizens, or other person or organizations made under the sponsorship or auspices of any neighborhood organization, qualified charitable organization or other organization, entity or person as a certified project participant, the eligible contributions are deemed to have been made to the entity, organization or person under whose sponsorship or auspices the eligible contributions are made, and that entity, organization or person is deemed to be the project transferee with relation to those eligible contributions. The deemed project transferee is liable for payment of the project certification fee.

7.3. The measure of the certification fee shall be the fair market value of the contribution and shall be measured as follows:

7.3.1. When the contribution is cash, the measure of the fee is upon the cash received.

7.3.2. When the contribution is personal or real property, the measure of the fee is the fair market value of the personal or real property as of the day the property is received by the project transferee.

7.3.3. When the contribution is in-kind professional services, the measure of the fee is 75 percent of the fair market value of the professional service provided. In-kind services are not eligible contributions unless the services are otherwise unavailable without charge in the community; they are not reimbursable, in whole or in part, from sources other than the tax credit provided; they are reasonably priced and valued; and they are reasonably necessary services customarily and normally provided by the contributor in the normal course of business to customers, clients or patients other than those encompassed by the certified project plan.

7.3.4. When the contribution is publicly traded common or preferred stock representing ownership in a corporation, the measure of the fee is the value of the stock at the average between the highest and lowest quoted selling prices on the date of transfer to the project transferee.

7.4. When Project Certification Fee is Due and Payable. The project transferee or deemed project transferee shall pay the certification fee to the Development Office within 30 days after receipt of any eligible contribution, or any portion of a contribution which, if given by itself, would constitute an eligible contribution.

**§145-7-8. Sanctions for Failure to Timely Pay Project Certification Fee.**

8.1. When the project certification fee is not paid within the time-frame identified in section 7.4 above, any or all of the following sanctions may be imposed at the sole discretion of the director of the Development Office:

8.1.1. Interest on the amount due calculated at the rate applicable to underpayment of taxes administered under the West Virginia Tax Procedure and Administration Act.

8.1.2. A penalty equal to 20 percent of the fee and interest due.

8.1.3. Prospective revocation of project certification. If project certification is revoked, any credit previously taken by any taxpayer with respect to the taxpayer's eligible contribution prior to the effective date of the revocation is not subject to recapture. However, the credit is subject to audit and adjustment or recapture by the Tax Commissioner in the same manner as other tax credits.

8.1.4. Retroactive withdrawal of project certification. If project certification is revoked retroactively, no credit is allowed with respect to the project and any credit taken by any taxpayer with respect to an eligible contribution made prior to the revocation is subject to recapture.

8.1.5. Suspension of project certification for a stated period of time. If project certification is suspended, no tax credit

shall be allowed for contributions made during the suspension period. A credit may be taken by any taxpayer for eligible contributions made to a project transferee prior to or subsequent to the suspension period. Any credit taken is subject to audit and adjustment or recapture by the Tax Commissioner in the same manner as other tax credits.

8.1.6. Temporary or permanent disqualification of one or more project transferees, neighborhood assistance organizations or other organizations, entities or persons from participating in a particular certified project. If a temporary or permanent suspension is imposed, no tax credit shall be allowed for any contribution made during the suspension period to any project transferee, neighborhood organization, qualified charitable organization, charitable organization or other organization, entity or person disqualified from participating in a certified project. Any tax credit taken by a taxpayer through the making of an eligible contribution to a project transferee, neighborhood organization, qualified charitable organization, charitable organization or other organization, entity or person pursuant to a certified project plan prior to or subsequent to the disqualification period is not subject to recapture. These credits are subject to audit and adjustment or recapture by the Tax Commissioner in the same manner as other tax credits.

8.1.7. Temporary or permanent disqualification of the project transferee, neighborhood organization, qualified charitable organization, charitable organization or other organization, entity or person, or group thereof, from participation in any and all certified projects currently in existence or to be formed, proposed or certified under these rules. No tax credit shall be allowed for any contribution made during the disqualification period to any project transferee, neighborhood organization, qualified charitable organization, charitable organization or other organization, entity or person disqualified pursuant to these rules. Tax credits received by an eligible taxpayer made prior to or subsequent to the disqualification period is not subject to recapture by reason of the disqualification. The credits remain subject to audit and adjustment or recapture by the tax

commissioner in the same manner as other tax credits. No certification may be issued during the disqualification period for any proposed project in which a project transferee, neighborhood organization, qualified charitable organization, charitable organization or other organization, entity or person disqualified pursuant to these rules as a proposed project participant.

8.1.8. These sanctions may be adjusted, withdrawn or waived, in whole or in part, at the sole discretion of the director of the Development Office. The certification fee shall not be waived by the director.

#### **§145-7-9. Administration and Collection of Project Certification Fees.**

9.1. Audits. The West Virginia Development Office or the Department of Tax and Revenue, or both, may initiate and carry out investigations or audits of a recipient of an eligible contribution, an eligible taxpayer, or a project transferee to determine whether the project certification fee imposed by this Act has been paid in accordance with the requirements of this Act.

9.2. Notice and Demand for Payment. When a project certification fee is not timely paid, the director of the Development Office may issue a written demand for payment of the fee, plus interest, to the project transferee. This notice must be delivered by certified mail or by personal service. A penalty for failure to timely pay the project certification fee may also be imposed. The penalty may not exceed twenty percent of the project certification fee and interest due and may be imposed, adjusted, withdrawn or waived, in whole or in part, at the sole discretion of the director of the Development Office. Payment of the project certification fee and interest due are not subject to waiver. The notice and demand for payment shall notify the project transferee of the opportunity to show that the project certification fee is not due and owing.

9.3. Notice of Pending Sanctions. When the project transferee fails to pay the amount due, as stated in the written notice and demand for payment, within 30 days after service of such

notice and demand, and the project transferee fails to provide to the satisfaction of the director proof that the fee is not due and owing, the director shall serve upon the project transferee a notice of pending sanctions. If the project transferee is not the applicant for the project certification, an informational copy of the notice of pending sanctions shall also be served upon the applicant for the project certification. Notice of pending sanctions shall be served on the project transferee in the same manner as an assessment of tax is served under the West Virginia Tax Procedures and Administration Act. The notice of pending sanctions shall state the sanctions to be applied, the effective date of the sanctions, with specific statements regarding whether the sanction will be applied retroactively, in whole or in part, and the commencement and termination dates for any suspension of certification or temporary disqualification of any project transferee, neighborhood organization, qualified charitable organization, charitable organization or other organization, entity or person to be disqualified from participating in a certified project. The notice of pending sanctions shall state that sanctions will be imposed 60 days after service of the notice of proposed sanctions upon the delinquent project transferee, unless the amount due and owing, plus interest and penalties, is paid in full.

9.4. Appeals. The project transferee may appeal a notice of proposed sanctions as if the notice were a notice of assessment of tax under the West Virginia Tax Procedure and Administration Act [W. Va. Code §11-10-1, et seq.], and the matter or appeal is subject to the procedures set forth in the Tax Procedures Act. The burden of proof is on the project transferee to prove that the project certification fee and associated interest and penalties are not due and owing. The review on appeal is limited to the following:

9.4.1. The issue of whether a failure to timely pay the project certification fee or any portion thereof has occurred, the time period or periods over which the failure occurred, and whether the failure continues to occur;

9.4.2. The amount of the project certification fee and interest due; and

9.4.3. The mathematical and methodological accuracy of the computation of the project certification fee, interest and penalties.

9.5. Confidentiality. No information, document, or proceeding brought, relating to the liability of any project transferee for the project certification fee, interest or penalties, is subject to the confidentiality provisions of the West Virginia Tax Procedure and Administration Act or any other confidentiality provision of the West Virginia Code. However, any proceeding relating to any amount of tax due or the recapture of tax credits taken under this Act or any adjustment of the amount of credit taken is subject to the confidentiality rules in the Tax Procedures Act and to all other applicable statutory tax confidentiality provisions of the West Virginia Code.

9.6. Finality of Notice of Pending Sanctions. The notice of pending sanctions becomes final 60 days after it is served upon the project transferee unless an appeal is filed within that period. When a determination that a project transferee has failed to timely pay the project certification fee, or any part thereof, becomes final, the sanctions described in the notice of pending sanctions shall apply as of the date set forth in the notice of pending sanctions, unless the amount due, including interest and penalties, is paid within 30 days after the date on which the determination becomes final. Sanctions for failure to timely pay the project certification fee may be imposed, adjusted, withdrawn or waived, in whole or in part, at the sole discretion of the director of the Development Office.

#### §145-7-10. Tax Credit Allowed.

10.1. Who May Claim Credit. Eligible taxpayers that make eligible contributions pursuant to a certified project plan may receive a tax credit.

10.2. Amount of credit allowed. The amount of credit allowed is fifty percent of the taxpayers eligible contribution. The minimum eligible contribution of a taxpayer shall be five hundred dollars (\$500.00). No contribution of cash, property or professional services or any

combination thereof contributed in any tax year by any taxpayer having a fair market value of less than five hundred dollars qualifies as an eligible contribution. The maximum eligible contribution by a taxpayer shall be two hundred thousand dollars (\$200,000.00). No contribution of cash, property or professional services or any combination thereof contributed in any tax year by any taxpayer having a fair market value in excess of two hundred thousand dollars qualifies as an eligible contribution.

10.2.1. Not more than twenty-five percent of total eligible contributions to a certified project may be in-kind contributions of professional services. Not more than twenty-five percent of total eligible contributions made by any taxpayer to any certified project may be in-kind contributions of professional services.

10.2.2. No tax credit shall be given prior to the making of an eligible contribution.

10.3. Tax credits are allowable only for the tax year of the eligible taxpayer in which the eligible contribution is irrevocably transferred to the project transferee, and for the next succeeding four years.

10.4. No tax credit shall be given for any contribution which, if the credit was allowed, the allowance would cause the amount of tax credit generated by the certified project to exceed the maximum amount of tax credit for which the project was certified.

10.5. Application of Tax Credit. The amount of credit allowable under this program must be taken within a five-year period beginning with the tax year in which the taxpayer irrevocably transfers its eligible contribution to the project plan transferee. The total credit any eligible taxpayer can claim shall not exceed \$100,000 in any tax year of the eligible taxpayer.

10.6. Claiming of Credit on Tax Returns. If the eligible taxpayer is a sole proprietorship, the credit allowed is applied to reduce the sole proprietor's personal income tax liability by up to fifty percent for the tax year. If the eligible taxpayer is a partnership or corporation, credit is applied first against the business franchise tax to

reduce the taxpayer's annual business franchise tax liability by up to fifty percent and is determined after application of credits allowed under W. Va. Code, §11-23-17, but before application of any other credits. The application of remaining credit will be as follows:

10.6.1. If the eligible taxpayer is a C corporation, the remaining credit may be applied to reduce its corporation net income tax liability by up to fifty percent and is determined before application of other allowable credits against this tax.

10.6.2. If the eligible taxpayer is an electing small business corporation (S corporation) or a partnership for federal income tax purposes, any unused credit may be applied by the shareholders of the S corporation, the partners in the partnership, or members of the limited liability company treated as a partnership, to reduce their liability for West Virginia personal income taxes by up to fifty percent. S corporations, partnerships and other unincorporated organizations may allocate the remaining credit among its shareholders, partners or members in the same manner as profits and losses are allocated for the tax year. Any taxpayer subject to the personal income tax under Chapter 11, Article 21 of the West Virginia Code, who makes an eligible contribution to a qualified charitable organization, and receives back from that organization a properly completed Neighborhood Investment Program voucher, is eligible to claim the credit. The credit shall be allowed against the personal income tax liability imposed under Chapter 11, Article 21 of the West Virginia Code without regard to the source of that income, whether it is from wages, passive investment income, income from a trade or business or any other source.

10.7. Forfeiture of Unused Credit. Credits not used in the year the taxpayer irrevocably transfers its eligible contribution to the project transferee or the succeeding four years may not be carried forward and therefore are forfeited. Credits may not be carried back to a tax year prior to the tax year in which the eligible contribution was made.

10.8. Publication of Who Takes Tax Credit. Annually, the tax commissioner shall publish in the State Register the name and address of every taxpayer claiming a neighborhood assistance credit on a tax return, as well as the amount of credit asserted by each taxpayer. The confidentiality provisions of W. Va. Code §§11-1-4a, 11-10-5d or any other section do not apply to this information.

#### **§145-7-11. Assertion of Credit Against Tax.**

11.1. Annual Credit Reporting Schedule. An eligible taxpayer which desires to claim a neighborhood assistance tax credit must file with the tax commissioner, in such form as the commissioner prescribes, an annual tax credit reporting schedule stating the amount of eligible contribution which the taxpayer has made. The taxpayer must attach to this form the certificate issued by the director of the Development Office evidencing approval of the project plan pursuant to which the contribution was made. The taxpayer shall attach to the report proof of payment of the eligible contribution to the transferee designated in the certified plan solely for the certified project. The taxpayer shall provide all information required by the tax commissioner's prescribed form. The schedule shall be filed with the annual corporation net income tax return for the tax year in which the eligible contribution is first irrevocably transferred to a transferee pursuant to a certified project plan, except:

11.1.1. If the eligible taxpayer is not required to file a corporation net income return, then the tax credit reporting schedule shall be filed with the annual business franchise tax return filed for the tax year in which the eligible contribution is first irrevocably transferred to a project transferee pursuant to a certified project plan; or

11.1.2. If the eligible taxpayer is not required to file a corporation net income tax return or a business franchise tax return, then the tax credit reporting schedule shall be filed with the annual personal income tax return filed for the tax year in which the eligible contribution is first irrevocably transferred to a project transferee pursuant to a certified project plan.

11.2. Disallowance of Credit. The tax commissioner may disallow any credit claimed pursuant to these rules and the Act when a properly completed tax credit reporting schedule or a properly completed and valid statement or proof of payment of the eligible contribution, or other required documentation, statements or proofs, are not timely filed.

11.3. Maximum Credit. The maximum amount of tax credits allowed under the Act may not exceed \$2.5 million in any state fiscal year. When the total amount of tax credits certified in a given fiscal year equals \$2.5 million, no further certifications may be issued during that fiscal year. Applications for project certification may be filed with the Development Office beginning July 1 of each fiscal year.

**§145-7-12. Adjustment of West Virginia Taxable Income.**

12.1. Any deduction, decreasing adjustment or decreasing modification taken by a taxpayer in determining federal taxable income which affects the determination of West Virginia taxable income under the personal or corporation net income tax laws of West Virginia for a charitable contribution in the taxable year, or payment or portion thereof, which qualified as an eligible contribution under these rules and for which credit is claimed, must be added to West Virginia taxable income when determining West Virginia personal or corporation net income tax liability, as appropriate for the taxable year.

**§145-7-13. Credit Recapture.**

13.1. If it appears on audit or pursuant to other information that an eligible taxpayer has not made a contribution as represented, or if it appears that contributions made by an eligible taxpayer were made to the direct or indirect benefit of the eligible taxpayer making the contribution, the credit previously allowed shall be recaptured, and amended returns must be filed for any tax year in which the credit was taken. Any additional taxes shown due on the amended return or returns must be remitted to the tax commissioner when the amended return or returns are filed, along with statutory interest and a ten percent penalty, which may be waived

by the tax commissioner if the taxpayer shows that the over claimed amount was due to reasonable cause and not due to willful neglect, and such other penalties and additions to tax as may be applicable under the West Virginia Tax Procedure and Administration Act. When a neighborhood assistance tax credit is taken on a tax return, the period of time in which the tax commissioner may issue a deficiency assessment is five years from the date the tax return was filed, or five years from the date of payment of any tax liability calculated pursuant to the assertion of the neighborhood assistance credit, whichever is later.

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**§145-7-14. Audits.**

14.1. In addition to, or instead of discretionary audits of eligible taxpayers which may be made by the tax commissioner, the tax commissioner may, in his or her discretion, conduct a joint audit in concert with the Development Office of the books and records and other information of any taxpayer, or of any person, organization or entity which has filed an application for certification of a project plan with the Development Office, or which asserted a neighborhood assistance credit on a tax return filed with the tax commissioner, or of any other person, organization or entity believed to have relevant information. For purposes of joint audits, or any administrative or judicial proceeding or procedure relating to any neighborhood assistance tax credit taken, asserted or sought, the tax commissioner may share such information as he or she may deem appropriate with the Development Office.

**§145-7-15. Preservation of Credit.**

15.1. Taxpayers which have gained entitlement to a neighborhood assistance credit for eligible contributions made to certified projects prior to July 1, 2011, shall retain that entitlement and apply the credit as outlined in these rules even if the neighborhood assistance credit program shall expire and no longer be in effect after that date.

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