

WEST VIRGINIA  
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Economic Development Authority TITLE NUMBER: 117

RULE TYPE: Legislative; CITE AUTHORITY 5E-1-5

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: Series 1

TITLE OF RULE BEING AMENDED: General Administration of the West Virginia

Capital Company Act: Establishment of the Application Procedures to  
Implement the Act

IF NO, SERIES NUMBER OF NEW 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 July 17, 1998 AT 5:00 p.m.

ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

David A. Warner

Director

West Virginia Economic Development Authority

1018 Kanawha Boulevard, E., Suite 501

Charleston, West Virginia 25301

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

David A. Warner

Authorized Signature David A. Warner

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

\$7.80

May 22, 1998

West Virginia Economic  
Development Authority  
Attn: Mr. David Warner  
Suite 501, 1018 Kanawha Blvd., E.  
Charleston, WV 25301

Re: 117 C.S.R. Series 1

Dear David:

Pursuant to W.Va. Code §5F-2-2(a)(12), I hereby consent to the filing and proposal of an emergency rule and a proposed legislative rule with regard to 117 C.S.R. Series 1.

A copy of this letter may be attached to your filings of the rule with the Secretary of State and Legislative Rule-Making Review Committee.

Sincerely,



Robert A. Reintsema  
Commissioner

RAR/b

**SUMMARY OF PROPOSED RULE**  
**TITLE 117, SERIES 1**

In accordance with the amendments to W. Va. Code, §5E-1-8 made during the 1998 Regular Session of the Legislature, the proposed rule removes the provisions of the current legislative rules which require the West Virginia Economic Development Authority (“WVEDA”) to accept, during the first 180 days of each fiscal year, only applications for certification as a West Virginia capital company and for tax credits authorized by the Capital Company Act (W. Va. Code, §5E-1-1 et seq.) submitted by companies investing their entire capital base in one or more small business investment corporations (“SBICs”). Therefore, the proposed rule provides that any applicant may submit its application on July 1 without regard to whether the applicant is SBIC-based.

Certain other provisions in the current legislative rules dealing with SBICs have been deleted in the proposed rule.

June 16, 1998

David A. Warner  
Director  
West Virginia Economic Development Authority

**STATEMENT OF CIRCUMSTANCES REQUIRING PROPOSED RULE  
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY  
TITLE 117, SERIES 1**

W. Va. Code, §5E-1-8 was substantially and materially amended during the 1998 Regular Session of the Legislature. This statutory amendment removed the requirement that the West Virginia Economic Development Authority (“WVEDA”) accept, during the first 180 days of each fiscal year, only applications for certification as a West Virginia capital company and for tax credits authorized by the Capital Company Act (W. Va. Code, §5E-1-1 et seq.) submitted by companies investing their entire capital base in one or more small business investment corporations (“SBICs”). The legislative rules currently in effect reflect §5E-1-8's provisions prior to the 1998 amendment. Therefore, the legislative rules currently in effect set forth an application procedure whereby WVEDA can only accept applications from SBIC-based companies from July 1 until December 27, while non-SBIC applicants may not apply until December 28. Under the amended statutory provisions, any applicant may submit its application on July 1 without regard to whether the applicant is SBIC-based.

It is typical that the tax credits applied for in each year exceed the tax credits available under the Capital Company Act. Given the situation, the application process is crucial and it is extremely important that applicants understand how to timely submit an application to WVEDA. Given that the 1998 amendment to §5E-1-8 (effective June 12, 1998) will govern the application process commencing on July 1, 1998, the proposed rule is required to make the legislative rules correspond with the amended statute.

Also, the 1998 amendment to §5E-1-8 removes all mention of SBICs from the Capital Company Act. Certain revisions to the legislative rules (as shown in the proposed rule) have been made to reflect the same.

June 16, 1998

David A. Warner  
Director  
West Virginia Economic Development Authority

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: General Administration of the West Virginia Capital Company Act:  
Establishment of the Application Procedures to Implement the Act

Type of Rule:  Legislative  Interpretive  Procedural

Agency West Virginia Economic Development Authority

Address 1018 Kanawha Boulevard, East, Suite 501

Charleston, WV 25301

304-558-3650

1. Effect of Proposed Rule

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$ -0-	\$ -0-	\$ -0-	\$ -0-	\$ -0-
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-
CURRENT EXPENSE	-0-	-0-	-0-	-0-	-0-
REPAIRS & ALTERNATIONS	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-
OTHER	-0-	-0-	-0-	-0-	-0-

2. Explanation of above estimates:

N/A

3. Objectives of these rules:

The objective of these rules is to bring the currently Legislative Rules into compliance with the 1998 amendments to W. Va. Code, §5E-1-8.

Rule Title: General Administration of the West Virginia Capital Company Act:  
Establishment of the Application Procedures to Implement the Act

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

There should be no economic impact.

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

There should be no economic impact.

C. Economic Impact on Citizens/Public at Large.

There should be no economic impact.

Date: June 15, 1998

Signature of Agency Head or Authorized Representative

David A. Warner

David A. Warner, Director, West Virginia Economic Development Authority

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TITLE 117  
LEGISLATIVE RULE  
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

SERIES 1

GENERAL ADMINISTRATION OF THE WEST VIRGINIA CAPITAL COMPANY ACT:  
ESTABLISHMENT OF THE APPLICATION PROCEDURES TO IMPLEMENT THE ACT

§117-1-1. General.

1.1. Scope. -- This Legislative Rule is promulgated to provide for the general administration of the West Virginia Capital Company Act. The West Virginia Capital Company Act was created to encourage the immediate investment in West Virginia businesses by making tax credits available to the investors in Qualified West Virginia Capital Companies. The Act gives the West Virginia Economic Development Authority the authority to designate eligible Capital Companies as qualified for such tax credits and sets forth the manner by which such companies must invest their capital base in West Virginia businesses. This Rule establishes the application procedure for such designation by the Authority, the general requirements for Qualified Companies, and the process for the authorization and use of tax credits.

1.2. Authority. -- W. Va. Code §§29A-1-2(d), and 5E-1-5.

1.3. Filing Date. -- ~~May 20, 1997~~  
\_\_\_\_\_.

1.4. Effective Date. -- ~~June 1, 1997~~  
\_\_\_\_\_.

1.5. Citation. -- This Legislative Rule may be cited as 117 C.S.R., Series 1, §117-1-\_\_\_\_\_  
(\_\_\_\_\_).

§117-1-2. Definitions.

2.1. "Act" means the West Virginia Capital Company Act, W. Va. Code §5E-1-1 et seq.

2.2. "Applicant" means (1) a profit or non-profit entity, organized and existing under the laws

of West Virginia, which is created for the purpose of making capital available for qualified investments or (2) a West Virginia business development corporation created pursuant to W. Va. Code §31-14-1 et seq., that seeks to be designated by the Authority as a Qualified Company. For purposes of this definition, entity includes, but is not limited to, a corporation (including an S Corporation), a partnership, a limited liability company and a trust.

2.3. "Authority" means the West Virginia Economic Development Authority, provided for in W. Va. Code §31-15-1 et seq.

2.4. "Authorized Tax Credits" means the tax credits provided for in W. Va. Code §5E-1-8.

2.5. "Capital Base" means the equity capital or net worth upon which tax credits are authorized for a Qualified Company, and from which source investments are to be made in accordance with this Rule.

2.6. "Capital Lease" means a lease meeting one or more of the following criteria:

2.6.a. The lease transfers ownership of the property to the lessee at the end of the lease term by the lessee's exercise of a purchase option which is de minimis in amount; or

2.6.b. The lease term is equal to seventy-five percent or more of the estimated economic life of the leased property. However, if the beginning of the lease terms falls within the last twenty-five percent of the total estimated economic life of the leased property, including earlier years of use, this criterion shall not be used; or

2.6.c. Under generally accepted accounting principals, the lessee cannot treat payments to the capital company as payments under an operating lease; or

2.6.d. For federal income tax purposes, the parties are required to treat payments as amortization of principal and interest.

2.7. "Certified West Virginia Capital Company" or "Certified Company" means (1) a West Virginia business development corporation created pursuant to W. Va. Code §31-14-1 et seq.; or (2) a profit or non-profit entity organized and existing under the laws of the State of West Virginia, created for the purpose of making venture or risk capital available for qualified investments, that has been certified as such by the Authority.

2.8. "Code" means the Code of West Virginia of 1931, as amended.

2.9. "Complete Application" means an application that contains all of the information required by this Rule, as determined by the Director, in his sole discretion.

2.10. "Debt or Debt Financing" means a loan to be repaid pursuant to a loan instrument with a stated maturity date of at least five (5) years, which loan instrument (i) shall be maintained by the Qualified Company for at least five (5) years pursuant to W. Va. Code §5E-1-12(b) and Subdivision 6.10.a of this Rule, (ii) is not subject to payment upon demand of the Qualified Company prior to its maturity date except upon acceleration due to default in terms and conditions ordinary and usual to loan instruments, and (iii) is originally issued by a West Virginia Business to the Qualified Company.

2.11. "Decertification" means the action of the Authority of revoking the Qualified Status from a Capital Company. Decertification may be involuntary due to a Capital Company's failure to comply with provisions of the Act or this Rule pursuant to Subsections 7.7, 7.8 and 7.9 of this Rule, or voluntary pursuant to Subsection 7.10 of this Rule.

2.12. "Designate as a Qualified Company" means the action of the Authority in designating a Certified Company as qualified for available tax credits and allocating such credits thereto relative to its capital base.

2.13. "Designate as Qualified" means the action of the Authority in authorizing (i) a separate capital base for a Qualified Company or (ii) an increase in a Qualified Company's capital base, and in allocating available tax credits relative to such separate capital base or increase in capital base.

2.14. "Development Corporation" means a West Virginia Business Development Corporation created pursuant to W. Va. §31-14-1 et seq.

2.15. "Director" means the Executive Director of the West Virginia Economic Development Authority, or his designated representative.

2.16. "Equity" or "Equity Financing" means common stock or preferred stock in a corporation purchased from the corporation including warrants and options purchased from the corporation which upon exercise entitle the Qualified Company to common or preferred stock. Equity shall also mean an ownership interest in a general partnership, ownership of limited partnership units and an ownership interest in a limited liability company. An investment otherwise meeting this definition shall not be considered as equity if the investment includes an option whereby the Qualified Company can compel the repurchase of the investment by the issuing corporation or any other person prior to the expiration of five (5) years from the date of purchase by the Qualified Company.

~~2.17—"Exclusive SBIC Application Period" means the period beginning with July 1 of each fiscal year through December 27 of that fiscal year.~~

~~2.17.~~ ~~2.18.~~ "Fiscal Year" means July 1 through June 30, which is the fiscal year of the State.

~~2.18.~~ ~~2.19.~~ "Insurance Company" means any person engaged in the business of making contracts of insurance.

~~2.19.~~ ~~2.20.~~ "Managing Body" shall mean the board of directors in the case of a corporation, voting partners in the case of a general partnership, general partners in the case of a limited partnership, members or managers in the case of a limited liability company and the management committee or similar decision making body in the case of a joint venture.

~~2.20.~~ ~~2.21.~~ "Partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financing operation, or venture is carried on; and the term partner includes a member of such syndicate, group, pool, joint venture or organization.

~~2.21.~~ ~~2.22.~~ "Qualified Investment" means a debt or equity financing of a West Virginia Business, but only if the business is engaged in one or more of the following activities: Manufacturing; agricultural production or processing; forestry production or processing; mineral production or processing, except for conventional oil and gas exploration; provision of services in a service industry; transportation; research and development of products or processes associated with any of the activities previously enumerated above; tourism, an example of which is provided at Subdivision 6.5.b of this Rule; computer software development companies engaged in the creation of computer software; and wholesale or retail distribution activities within the state. The investment by a Qualified Company in purchases of property to be leased by it, as lessor, through a capital lease, as defined in Subsection 2.6 of this Rule, to a West Virginia Business lessee engaged in one of the above enumerated activities is a qualified investment.

~~2.22.~~ ~~2.23.~~ "Qualified West Virginia Capital Company" or "Qualified Company" means a Certified West Virginia Capital Company that has been designated by the Authority as a Qualified Capital Company under the provisions of W. Va. Code §5E-1-6 and which has raised a minimum

capital base of One Million Dollars to a maximum of Four Million Dollars per fiscal year, upon which capital base, tax credits are allocated.

~~2.23.~~ ~~2.24.~~ "S Corporation" or "Subchapter S Corporation" means a small business corporation as defined in Section 1361(b) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 1 et seq., as amended, for which an election under Section 1362(a) of said Code is in effect.

~~2.25.~~ "SBIC" means any small business investment corporation organized under the Federal Small Business Investment Act of 1958, 15 U.S.C. §§ 661 et seq., as amended, and approved as such by the appropriate federal agency(ies).

~~2.26.~~ "SBIC Investor" means a company that certifies in its application for designation as a Qualified Company, or its application for designation as qualified of a separate capital base or of an increase in capital base, that the investment of its entire capital base will be in one or more small business investment corporations organized under the Federal Small Business Investment Act of 1958, 15 U.S.C. §§ 661 et seq., as amended.

~~2.24.~~ ~~2.27.~~ "Service Industry" means a type of business that has ordinary characteristics of retail establishments except that services instead of goods are sold and the principal activity of which is furnishing service to the consuming public. Service industries include, by way of example and not by way of limitation, barbershops, laundries and automobile repair shops.

~~2.25.~~ ~~2.28.~~ "State" means the State of West Virginia.

~~2.26.~~ ~~2.29.~~ "West Virginia Business" means any business which is located in or is principally based in West Virginia, with more than fifty percent (50%) of its assets and operations located in West Virginia, and with more than fifty percent (50%) of its employees being West Virginia residents. For purposes of this definition, more than fifty percent (50%) of the "operations" of a

business shall mean more than fifty percent (50%) of the gross revenues of a business.

**§117-1-3. Procedure to Become a Qualified West Virginia Capital Company.**

3.1. General Rule. -- In order to be designated a Qualified West Virginia Capital Company, the Act requires that an Applicant be a Certified Company. An Applicant will be a Certified Company upon the Authority certifying that the Applicant is a profit or nonprofit entity organized and existing under the laws of the State of West Virginia and created for the purpose of making venture or risk capital available for Qualified Investments; provided that, such certification is unnecessary in the case of Development Corporations, which by such status are deemed Certified Companies. For purposes of implementing the tax credit program established by the Act and to facilitate the process of qualification by the Authority, the Authority will combine the processes of (1) certifying applicants as Certified Companies, and (2) designating Certified Companies as Qualified West Virginia Capital Companies under the Act, into a one step procedure.

3.2. Requirements for Qualified Company. -- The following requirements shall apply as indicated to all Qualified Companies and/or Applicants:

3.2.a. Certification. -- A Qualified Company shall be a Certified West Virginia Capital Company.

3.2.b. Business Office. -- An Applicant or Qualified Company shall have a reasonably accessible business office located within the State of West Virginia. The office shall have a listed telephone number and shall be open to the public during normal business hours.

3.2.c. Amount of Capital base. -- An Applicant or Qualified Company shall have a capital base of at least One Million Dollars, but not greater than Four Million Dollars, which capital base must be raised after July 1, 1986. If the

amount of the investment in an Applicant or Qualified Company in any fiscal year exceeds Four Million Dollars, such amount in excess of Four Million Dollars shall not be eligible for tax credits under the Act for that fiscal year. A capital base of a Qualified Company which falls below the minimum requirement of One Million Dollars due to the uncollectability and write-off of a qualified investment shall not be in violation of the One Million Dollar minimum requirement set forth in this Subdivision and in W. Va. Code §5E-1-7(d).

3.2.d. Maintenance of Capital Base. -- After designation as a Qualified Company, a Qualified Company shall maintain all of its capital base, as defined in this Rule, except that which has been invested in Qualified Investments, in bank accounts and financial institutions which are located in the State of West Virginia, or in such other interest bearing instruments with a maturity of less than one (1) year which are obtained from and managed by a West Virginia corporation. For purposes of this Rule, the phrase "interest bearing instruments with a maturity of less than one (1) year which are obtained from and managed by a West Virginia corporation" shall include, by way of example and not by way of limitation, direct investment in interest bearing money management or similar accounts or certificates of deposit maturing in one (1) year or less obtained from a West Virginia branch office of a brokerage firm.

3.2.e. Limitation on Debt Investment in Capital Base. -- No more than twenty-five (25%) percent of each separate capital base of an Applicant or Qualified Company shall be in the form of full recourse, interest bearing demand notes. Such notes must be backed by an irrevocable letter of credit or bond from a reputable source, as determined by the Authority.

3.2.f. Stated Purpose. -- An Applicant or Qualified Company's stated purpose must be to encourage and assist in the creation, development or expansion of West Virginia businesses.

3.2.g. Escrow Accounts.

1. An Applicant shall establish an escrow account located in West Virginia. All

funds invested in the Applicant shall be deposited and held in the escrow account for the period of time between their receipt by the Applicant and the designation of the Applicant as a Qualified Company.

2. A Qualified Company, seeking to establish a separate capital base or increase its capital base, shall establish a separate escrow account located in West Virginia for each separate capital base or each increase to capital base sought. All funds invested in the Qualified Company relative to a separate capital base or increase to capital base shall be deposited and held in the applicable escrow account for the period of time between their receipt by the Qualified Company and the designation as qualified of the respective separate capital base or increase to capital base.

3. Escrowed funds shall not be invested by the Applicant or the Qualified Company until the Authority designates the Applicant a Qualified Company, or designates as qualified the separate capital base or increase to capital base sought, as applicable. In the event the Authority does not designate the Applicant a Qualified Company, or designate as qualified the separate capital base or increase to capital base sought, the escrowed funds shall be returned to the investors, if requested by the investors.

3.2.h. Disclosure to Investors. -- An Applicant or Qualified Company, when soliciting funds for its capital base, must disclose that no tax credit for the investor's investment will be available until the Authority either designates the Applicant a Qualified Company or designates as qualified a separate capital base or an increase to capital base, and issues to the Qualified Company notice of such qualification and a Certificate of tax credit.

3.2.i. Business Registration Certificate. -- An Applicant or Qualified Company must hold a valid West Virginia business registration certificate pursuant to W. Va. Code§11-12-1 et seq., or be exempt from such registration.

3.3. Application Requirements. -- An Applicant shall make written application for

designation as a Qualified West Virginia Capital Company to the Authority on application forms provided by the Director. The application form shall be signed and verified by the Applicant or by a duly authorized officer, partner, limited liability company member or manager or trustee of the Applicant and contain the following information:

3.3.a. The full legal name of the Applicant;

3.3.b. The mailing and office addresses and telephone numbers of the Applicant's principal office in this State; and if different, the mailing and office addresses and telephone numbers of the Applicant's principal place of business;

3.3.c. Information that the Applicant's purpose is to encourage and assist in the creation, development or expansion of West Virginia businesses;

3.3.d. A certified copy of the Applicant's Certificate of Incorporation, and Articles of Incorporation or Corporate Charter; a certified copy of the Applicant's certificate of formation of limited or general partnership; a certified copy of the Applicant's Articles of Organization of a limited liability company; such documents that evidence the creation of a trust; or such other evidence that the Applicant is organized and existing under the laws of the State of West Virginia;

3.3.e. The titles, names, addresses and telephone numbers of the Applicant and the Applicant's directors and officers; or general, limited and managing partners; or limited liability company managers; or trustees; which addresses shall include street and number, city or town, state and zip code;

3.3.f. The names, addresses and telephone numbers of all of the Applicant's investors, including street and number, city or town, state and zip code, and income tax return filing status of each investor, including whether each investor is a fiscal or calendar year taxpayer; and each investor's employer identification or social security number; and for investors that are partnerships, S

Corporations, limited liability companies or individual joint investors, the foregoing information for all partners, shareholders, members and individuals;

3.3.g. Information that the Applicant has disclosed to all investors that a tax credit is not available for such investor's investment in an Applicant until the Authority has designated the Applicant a Qualified West Virginia Capital Company and the investor has received a certificate authorizing the tax credit approved by the Authority for each fiscal year;

3.3.h. Information that the Applicant has disclosed to all investors that the State of West Virginia is not liable in any manner for any damages which may result from or arise out of the provisions of the Act, this Rule, or the application thereof;

3.3.i. A statement that the Applicant will use its capital base, as defined in this Rule, to make qualified investments in accordance with the schedule set forth in W. Va. Code §5E-1-12 and Subsection 6.3 of this Rule;

3.3.j. A statement that the Applicant will comply with all requirements of the Act and this Rule, including without limitation, investment of its capital base in accordance with the provisions of the Act and this Rule.

3.3.k. If the Applicant is a corporation, information on the aggregate number of shares which it has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class;

3.3.l. Information stating the total capital base of the Applicant and how the value has been determined;

3.3.m. Information regarding whether the Applicant has been involuntarily decertified under Subsections 7.7 through 7.9 of this Rule and whether any of the Applicant's directors, officers, general partners, managing partners, limited liability company members or managers, trustees or investors have ever served as directors, officers,

general partners, managing partners, limited liability company members or managers or trustees of any decertified Qualified Company;

3.3.n. Information that the Applicant has established an equity escrow account in West Virginia into which account funds invested by investors have been deposited and will be held for the period of time between their investment and the designation of the Applicant by the Authority as a Qualified Company, the location of such account, that the Applicant has disclosed to the investors that no funds will be invested by the Applicant until it has been designated as a Qualified Company and that in the event the Applicant does not so qualify, that the funds shall be returned to the investors, if requested by the investors;

3.3.o. If any of the investors in the Applicant is a partnership, an S Corporation, a limited liability company or an individual joint investor, the apportionment plan, the employer identification or social security number of those to whom the tax credits are apportioned, and statements signed by each partner, shareholder, member or individual consenting to the apportionment plan; all of which requirements are more fully set out in Subdivision 5.7.f of this Rule;

3.3.p. The information required in Subsection 5.1 of this Rule;

3.3.q. Information that the Applicant holds a valid West Virginia business registration certificate pursuant to W. Va. Code §11-12-1 et seq., or is exempt from such registration;

3.3.r. Such additional information as may be requested by the Authority.

3.4. Application Form. -- The form for applying to become a Qualified West Virginia Capital Company may be obtained from the Director at the following address: West Virginia Economic Development Authority, 1018 Kanawha Blvd., Suite 501, Charleston, WV 25301-2828.

3.5. Filing. -- Each Applicant shall file with the Director three (3) complete applications with original signatures.

### 3.6. Application Receipt and Review.

3.6.a. Acceptance in General. -- During regular business hours of the Authority, applications relative to tax credits available in a particular fiscal year shall be received by the Director on a first come, first served basis beginning on July 1 of that fiscal year and continuing thereafter in that fiscal year until all tax credits authorized for that fiscal year by the Act shall have been exhausted, ~~subject, however, to the specific provisions of Subdivision 3.6.d of this Rule.~~ The Director shall record the time and date of receipt of an application. Applications submitted by mail or a courier or delivery service shall be deemed to be received at 12:00 noon on the day of delivery, regardless of the time of day of actual delivery; provided that, an application submitted by mail or a courier or delivery service shall be received and accepted by the Director only if the application is delivered after the beginning of the period in which the application would be accepted if delivered in person.

3.6.b. Simultaneous Receipt. -- In the event that, upon the opening for business of the Offices of the Authority on any day, more than one Applicant is waiting for the Offices to open in order to submit an application, then the applications of all Applicants so waiting shall be deemed received simultaneously by the Director.

#### 3.6.c. Review of Applications.

1. General Rule. -- The Director shall review all applications in the order of their receipt, subject to Paragraph 3.6.c.2 of this Rule below, to determine if each application is complete. The Director shall have sole discretion to determine whether an application is complete. The Director's determination shall be made within forty-five (45) days of the application's receipt. In the event that the Director determines an application to be incomplete, the Director shall notify the Applicant, in writing, of the reasons for such determination and shall return the incomplete application to the Applicant. The Applicant may resubmit the application after correcting the deficiencies stated in the notice. If an application, though incomplete, is substantially complete as

determined in the sole discretion of the Director, the time of receipt of the resubmitted application, for purposes of review by the Director, shall be deemed to be the time of receipt of the initial application if tax credits remain available at the time of resubmission. If an application is not substantially complete as determined in the sole discretion of the Director, the resubmitted application shall be considered received, for purposes of review by the Director, when resubmitted.

2. Review of Simultaneously Received Applications. -- In the event of simultaneously received applications, the Director shall first review the applications to determine the tax credits sought by each application, and the total of the tax credits sought by all the simultaneously received applications. If the total tax credits sought by all the simultaneously received applications are less than the total tax credits then available for that fiscal year, after taking into account applications reviewed previously and determined to be complete or substantially complete, the Director shall proceed to review the simultaneously received applications for completeness and such applications shall be considered simultaneously reviewed. If the total tax credits sought by all the simultaneously received applications exceed the total tax credits then available for that fiscal year, after taking into account applications reviewed previously and determined to be complete or substantially complete, the Director shall, within fifteen (15) days, but not earlier than five (5) days, after the receipt of such applications, conduct a lottery to determine the order of review of the simultaneously received applications, as follows:

A. All Applicants that submitted simultaneously received applications shall be provided written notice of the lottery and be provided the opportunity for their designated representative to attend the lottery.

B. To conduct the lottery, the Director shall: (i) prepare for each Applicant that submitted a simultaneously received application, on index cards of the same fundamental character, an index card setting forth the Applicant's name

and the tax credits sought by the Applicant by its application; (ii) deposit in a container one such index card for each Applicant; (iii) select and draw from the container one index card in a manner that the Director may not determine the Applicant set forth thereon; (iv) announce and record the Applicant whose index card was drawn and the amount of tax credits sought by that Applicant; and (v) repeat steps (iii) and (iv) until all Applicants' cards are drawn from the container.

C. Each simultaneously received application shall be then reviewed for completeness by the Director in the order in which it was drawn from the container.

D. Prior to, or at any time during the lottery process, one or more Applicants, by agreement or otherwise, may voluntarily decrease the amount of tax credits sought by its application, provided the minimum capitalization requirements of the Act and this Rule continue to be satisfied.

~~3.6.d. Exclusive SBIC Application Period. -- During the Exclusive SBIC Application Period, the Director shall not receive, accept or review any application that does not include the Applicant's certification that the investment of the entire capital base of the Applicant will be in one or more small business investment corporations (SBICs) organized under the provisions of the Federal Small Business Investment Act of 1958, 15 U.S.C. §§ 661 et seq., as amended.~~

~~3.6.e. Open Application Period. -- Beginning on December 28 of each fiscal year (or the next business day of the Authority thereafter if December 28 is not a business day of the Authority in that fiscal year), applications will be received by the Director regardless of the Applicant's certification as to investment in SBICs.~~

~~3.6.f. Premature Application. -- Any application submitted to the Authority during the Exclusive SBIC Application Period that does not include the Applicant's certification set forth in Subdivision 3.6.d of this Rule will be deemed rejected and not received by the Director, regardless of actual physical receipt of the application. Rejected applications will not be~~

~~reviewed by the Director either during or after the Exclusive SBIC Application Period.~~

3.7. False Information. -- The submittal of any false or misleading information by an Applicant will be grounds for rejection of the application and denial of further consideration of such Applicant for qualification in that and subsequent fiscal years.

3.8. Complete Application. -- Upon a determination by the Director that an application is complete, the Director shall place the complete application on the agenda of the next regularly scheduled meeting of the Authority. Complete applications shall be placed on such agenda in the order of their review by the Director.

3.9. Action of Authority. -- The Authority shall consider all applications in the order they are placed on the agenda of any regularly scheduled meeting of the Authority. The Authority shall certify as a Certified Company and designate as a Qualified Company those Applicants which meet the requirements of the Act and this Rule.

3.10. Allocation of Tax Credits. -- Upon designating an Applicant a Qualified West Virginia Capital Company, the Authority shall allocate, in the order in which companies are so designated by the Authority, available tax credits for the investors in the Qualified Company, subject to Subsection 3.12 of this Rule.

3.11. Notification of Action. -- The Director shall notify the Applicant in writing of the Authority's action designating or refusing to designate the Applicant a Qualified West Virginia Capital Company. The Director shall issue to a Qualified Company the Certificate of tax credit provided for in Subsection 5.5 of this Rule. Notice to a Qualified Company shall set forth the level of capitalization that qualifies for tax credits under W. Va. Code §5E-1-8. Notice to an Applicant not designated a Qualified Company shall set forth the reasons for such determination.

3.12. Suspension of Qualification Process. -- Notwithstanding the above provisions of this Rule, in any fiscal year, upon the allocation to Qualified

Companies of the total tax credits authorized for that fiscal year by the Act, the Authority shall suspend the qualification process and the Director shall reject all subsequently submitted applications. When, in any fiscal year, the total tax credits authorized in that fiscal year by the Act have previously been allocated to Qualified Companies, all applications received and then pending, and all applications thereafter submitted to the Director in that fiscal year will not be reviewed by the Director or considered by the Authority in that or any subsequent fiscal year. Rather, the Applicant that submitted such an application must submit a new application in a subsequent fiscal year in order to be eligible for tax credits in that subsequent fiscal year. Upon determining that an application will not be reviewed pursuant to this Subsection, the Director shall mail written notice of that determination to the Applicant's principal office in this State.

3.13. Additional Applications. -- A Qualified Company which does not seek additional tax credits under Section 4 of this Rule is not required to file any additional application with the Authority to retain its status as a Qualified Company, provided that the Qualified Company remains in compliance with the requirements of the Act and this Rule.

3.14. Amendments. -- Any Applicant or Qualified Company must notify the Director of any changes in any of the information filed with the Authority as part of an application filed under Section 2 or 3 of this Rule or any other information submitted to the Authority pursuant to this Rule. Such notification must be in writing and filed by the Qualified Company with the Company's next semi-annual report required pursuant to Subsection 5.1 of this Rule.

#### **§117-1-4. Additional Tax Credits.**

##### **4.1. Separate Capital Base.**

4.1.a. General Rule; Amount. -- During each fiscal year, a Qualified Company may apply to the Authority for designation as qualified of a separate capital base. A separate capital base must

be in the amount of at least One Million Dollars but may not exceed Four Million Dollars.

4.1.b. Application Requirements. -- The Qualified Company shall file an application on the form provided for in Subsection 3.3 of this Rule and shall provide the information required for Applicants under that Subsection, as it applies to the Qualified Company's separate capital base, with all references therein to Applicants, investors, capital bases and designation as a Qualified Company being read to apply to Qualified Companies applying for designation as qualified of a separate capital base, investors in the separate capital base, the separate capital base sought and designation as qualified of the separate capital base, respectively, and shall also amend its original application to reflect any changes in the information that it initially filed with the Authority.

4.1.c. Application; Receipt; Review; Action; Tax Credit Allocation. -- The provisions of Subsections 3.4 through 3.14 of this Rule shall apply to the application process, receipt and acceptance of applications, review of applications by the Director, action by the Authority and allocation of tax credits, with all references therein to Applicants and applications being read to apply to Qualified Companies applying for designation as qualified of a separate capital base and applications therefor, respectively.

4.1.d. Separate Capital Base; Requirements. -- Designation as qualified of a separate capital base will create a separate capital base for the Qualified Company. Each separate capital base shall be subject to all investment and reporting requirements of the Act and Sections 6 and 7 of this Rule, independent of any other capital base of the Qualified Company.

#### **EXAMPLE:**

Qualified Company, in fiscal year 1991, has a capital base of Two Million Dollars (\$2,000,000.00). In fiscal year 1992, Qualified Company may qualify a new and separate capital base (other than its original capital base of \$2,000,000.00), pursuant to Subsection 4.1 of this Rule, in an amount of at

least One Million Dollars (\$1,000,000.00) and not to exceed Four Million Dollars (\$4,000,000.00). Such new and separate capital base qualified in 1992 shall be governed by the provisions of the Act as amended in 1991 and this Rule, including the 35-55-75 investment schedule of W. Va. Code §5E-1-12(a) and Subsection 6.3 of this Rule.

#### 4.2. Increases to Capital Base.

4.2.a. General Rule; Amount. -- During any fiscal year in which it has not received approval for the maximum tax credit under Subsection 5.2 of this Rule of Two Million Dollars for that year, a Qualified Company may apply to the Authority for designation as qualified of an increase in its existing capital base and additional tax credits thereon in accordance with Subsection 5.3 of this Rule; provided, however, the maximum total amount to which an existing capital base may be increased is Four Million Dollars (\$4,000,000.00).

4.2.b. Application Requirements. -- The Qualified Company shall file an application on the form provided for in Subsection 3.3 of this Rule and shall provide the information required for Applicants under that Subsection, as it applies to the increase of the Qualified Company's capital base, with all references therein to Applicants, investors, capital bases and designation as a Qualified Company being read to apply to Qualified Companies applying for designation as qualified of an increase to capital base, investors in the increase to capital base, the increase to capital base sought and designation as qualified of the increase to capital base, respectively, and shall also amend its original application to reflect any changes in the information that it initially filed with the Authority.

4.2.c. Application; Receipt; Review; Action; Tax Credit Allocation. -- The provisions of Subsections 3.4 through 3.14 of this Rule shall apply to the application process, receipt and acceptance of applications, review of applications by the Director, action by the Authority and allocation of tax credits, with all references therein to Applicants and applications being read to apply

to Qualified Companies applying for designation as qualified of an increase to capital base and applications therefor, respectively.

4.2.d. Fiscal Year. -- Designation as qualified of an increase to capital base will increase the Qualified Company's existing capital base regardless of the year in which the initial capital base was qualified, but tax credits resulting from the increase to capital base shall be allocated from tax credits authorized for the fiscal year in which application for such increase was made.

4.2.e. Single Total Capital Base; Requirements. -- The initial capital base and all increases to it shall together constitute a single total capital base. That total capital base shall be subject to all investment and reporting requirements of the Act and Sections 6 and 7 of this Rule, on a prospective basis, as if the total capital base was qualified in its entirety at the time of qualification of the initial capital base; provided that, where a Qualified Company was designated as such prior to the 1991 amendments to the Act, and its increase to capital base was designated as qualified subsequent to such amendments, the pre-amendment requirements shall apply to the initial portion of the total capital base and the post-amendment requirements shall apply to the increase.

4.2.f. Investment Schedule Limitation. -- Notwithstanding the above provisions, no increase to capital base shall be designated as qualified if, at the time of designation, the Qualified Company would be in violation of Subdivision 6.3.c of this Rule with regard to the total capital base.

#### EXAMPLE 1:

Qualified Company was qualified on February 1, 1989 with a capital base of \$1,000,000.00. Qualified Company wishes to increase its capital base pursuant to Subsections 4.2 and 5.3 of this Rule. An increase of \$500,000.00 is approved by the Authority on October 1, 1991. With the increase, Qualified Company has a single capital base of \$1,500,000.00. However, the original \$1,000,000.00 is subject to the 20-40-

60 investment schedule under the Act prior to its 1991 amendment, while the \$500,000.00 increase is subject to the 35-55-75 investment schedule of W. Va. Code §5E-1-12(a) and Subsection 6.3 of this Rule. The \$500,000.00 increase occurs in Year 3 of the original 20-40-60 investment schedule. Therefore, as illustrated below, by the end of Year 3, Qualified Company must have invested in a qualified manner a total of \$975,000.00 (60% of the original \$1.0 million plus 75% of the \$500,000.00 increase).

**Year 1 -- 2/1/89 - 2/1/90**

Cumulative Required Investment	<u>\$200,000.00</u> (20% of \$1.0 million)
Total	\$200,000.00

**Year 2 -- 2/1/90 - 2/1/91**

Cumulative Required Investment	<u>\$400,000.00</u> (40% of \$1.0 million)
Total	\$400,000.00

**Year 3 2/1/91 - 2/1/92**

Cumulative Required Investment	\$600,000.00 (60% of \$1.0 million)
	+
	<u>\$357,000.00</u> (75% of \$500,000.00)
Total	\$975,000.00

**EXAMPLE 2:**

Qualified Company was qualified on February 1, 1987 with a capital base of \$1,000,000.00. In 1991, Qualified Company wishes to increase its original capital base by \$500,000.00. However, the original

\$1,000,000.00 was subject to the 20-40-60 investment schedule under the Act prior to its 1991 amendment, while the \$500,000.00 increase, if approved, would be subject to the 35-55-75 investment schedule of W. Va. Code §5E-1-12(a) and Subsection 6.3 of this Rule. Unless Qualified Company had invested \$975,000.00 (60% of the original \$1.0 million plus 75% of the \$500,000.00 increase) by February 1, 1990, the \$500,000.00 increase in 1991 would not be approved as an increase to the original capital base. Furthermore, given that each separate capital base must be in the amount of at least \$1,000,000.00, Qualified Company would need to raise an additional \$500,000.00 to be able to form a separate capital base pursuant to Subsection 4.1 of this Rule.

**§117-1-5. Tax Credits.**

5.1. Semi-Annual Reports. -- Each Qualified Company shall report to the Tax Commissioner and the Authority on a semi-annual basis, and shall file separate reports for each separate capital base that is designated as qualified by the Authority. In each fiscal year until the Qualified Company is decertified by the Authority, a report covering the first and second quarters of the Company's fiscal year, and a report covering the third and fourth quarters of the Company's fiscal year, shall be submitted to the Authority no later than thirty (30) days following the end of the respective two-quarter period. However, the initial report need not be submitted until thirty (30) days following the end of the first two-quarter period ending more than six (6) months after the Company's designation as a Qualified Company or the designation as qualified of the separate capital base. The initial report shall contain the following information:

5.1.a. The name of each investor in the Qualified Company who has received, or is to receive, a tax credit as the result of investment in the subject capital base;

5.1.b. The amount of each investor's investment in the subject capital base and the date on which the investment was made;

5.1.c. The amount of tax credit allowed to the investor as the result of investment in the subject capital base;

5.1.d. All Qualified Investments the Qualified Company has made; and

5.1.e. Any additional information requested by the Authority.

Each subsequent report shall contain only changes or additions in information from the initial report.

5.2. Maximum Authorized Credits. -- The total amount of tax credits authorized for a single Qualified Company may not exceed Two Million Dollars during any single State fiscal year.

5.3. Additional Tax Credits. -- If a Qualified Company has not received approval for the maximum tax credit of Two Million Dollars within any State fiscal year, the Qualified Company may apply, pursuant to Subsection 4.2 of this Rule, as many as three times during any State fiscal year for additional credits of at least \$50,000.00 each by seeking designation as qualified of increases to its capital base.

5.4. Total Credits; Allocation. -- The total credits which may be authorized by the Authority for all Qualified Companies may not exceed a total of Ten Million Dollars in each fiscal year is set forth in the Act. The Authority shall allocate these credits to Qualified Companies in the order in which the companies are designated as Qualified West Virginia Capital Companies or their separate capital bases or increases to capital base are designated as qualified, as the case may be.

5.5. Certificate of Tax Credit. -- The Authority shall issue to the Qualified Company the Authority's Certificate approving the amount of tax credits allocated to the Qualified Company. The Authority's Certificate shall list the investors entitled to a tax credit and the amount of credit allotted to each such investor. The Qualified Company shall issue to each investor entitled to a tax credit, the Qualified Company's Certificate on a form prepared by the Authority, signed and

verified by the Qualified company or by a duly authorized officer, partner, limited liability company member or manager, or trustee of the Qualified Company. The Qualified Company's Certificate shall set forth the amount of the investor's credit. The investor shall submit a true copy of the Qualified Company's Certificate with the investor's tax return requesting a tax credit. If the investor entitled to a tax credit is a partnership, an S corporation, a limited liability company or an individual joint investor, the tax credit shall be apportioned among the partners, the shareholders of the corporation, the members or the individual investors pursuant to the provisions of Subdivision 5.7.f of this Rule.

5.6. Investors Entitled to Tax Credit; Amount. -- Any investor, including an individual, partnership, limited liability company or corporation, who makes an investment in an Applicant that is designated a Qualified Company pursuant to this Rule or who makes an investment in a Qualified Company's separate capital base or increase to capital base that is designated as qualified, is entitled to a tax credit, as allocated under Subsection 3.10 of this Rule, equal to fifty percent (50%) of the investment, except as otherwise provided by the Act or this Rule. The partners of a partnership, the shareholders of an S corporation, the members of a limited liability company and individual joint investors shall be entitled to the credits allocated and authorized by the Authority for investments by the partnership, the S corporation, the limited liability company or the joint investors in accordance with the apportionment plan provided for in Subdivision 5.7.f of this Rule.

5.7. Application of Tax Credits.

5.7.a. General Rule. -- The amount of tax credit allowed for the taxable year is the portion of the tax credit authorized under W. Va. Code §5E-1-8(c) and Subsection 5.6 of this Rule that does not exceed the tax liability limitation as hereinafter provided.

5.7.b. Tax Credit Available. -- The credit available for the taxable year is the sum of:

1. Unused tax credit carried forward from prior taxable years (carryforwards); and

2. Amount of tax credit determined under W. Va. Code §5E-1-8(c) for the taxable year and described in Subsection 5.6 of this Rule (tax credits earned).

5.7.c. Tax Liability Information. -- Tax credit available for a taxable year beginning after June 30, 1986, must be applied against the same taxes as set forth in W. Va. Code §11-13C-5(c) through (i), and in that order.

5.7.d. Excess Tax Credit. -- The excess of the tax credit available over the applicable tax liability limitation for the year is an unused credit which may be carried forward as provided for under Subsection 5.8 of this Rule.

5.7.e. Order of Application. -- If the tax credit available for a taxable year is not allowed in full because of the tax liability limitation, carry forwards are applied against the tax liability limitation first. To the extent the tax liability limitation exceeds carry forwards, tax credit earned for the taxable year is then applied.

5.7.f. Apportionment.

1. The tax credits authorized by the Authority for investments by a partnership, an S corporation, a limited liability company or individual joint investors shall be divided pursuant to election of partners, shareholders, members or individuals as hereinafter provided.

2. The tax credit authorized shall be apportioned among partners, S corporation shareholders, limited liability company members or individual joint investors in any manner they may select, provided that each such partner, shareholder, member or individual consents in writing to an apportionment plan. The written consent to an apportionment plan must be signed by each partner, shareholder, member or individual, or their duly authorized agents. The written consent shall set forth the name, address, employer identification number or social security number and taxable year for which the credit will

be claimed for each partner, shareholder, member or individual and the amount of tax credit apportioned to each of them under the plan. The consent of more than one partner, shareholder, member or individual may be incorporated in a single statement. The statement shall be filed with the application required pursuant to Subsection 3.3 of this Rule and shall be irrevocable and not subject to change after filing unless the tax credit authorized by the Authority is less than the tax credit applied for, in which case the Authority may request the apportionment plan to be amended. Each partner, shareholder, member and individual consenting to an apportionment plan shall keep as part of his records a copy of the statement containing all of the required consents.

3. An apportionment plan adopted and consented to by all partners, S corporation shareholders, limited liability company members or joint individual investors shall be valid only for the tax credits authorized by the Authority pursuant to the application with respect to which the plan is filed. A separate consent to an apportionment plan must be filed with respect to each application filed pursuant to Subsection 3.3 of this Rule.

5.7.g. Limitation. -- Tax credits authorized by the Authority may not be used against any liability the taxpayer may have for interest, penalties, or additions to tax.

5.8. Carryforward of Unused Tax Credit.

5.8.a. General Rule. -- Unused tax credit may be carried forward to succeeding taxable years but not beyond fifteen (15) years. Carry forwards of unused tax credit are taken into account in determining the amount of tax credit available and the tax credit allowed for the taxable years to which they may be carried.

5.8.b. Unused Credit. -- If carry forwards and tax credit earned exceed the tax liability limitation, the excess attributable to tax credit earned is an unused tax credit. The taxable year in which an unused tax credit arises is referred to as the "unused credit year".

5.8.c. Limitation on Carry forwards. -- Tax credit carry forwards to a taxable year may not exceed the applicable tax liability limitation for that year. Tax credit carry forwards from an unused tax credit year are applied before tax credit carry forwards from a later unused tax credit year.

5.8.d. Joint Return by Husband and Wife. -- This Subdivision prescribes additional rules for computing the tax credit carry forwards of a husband and wife making a joint return for one or more of the taxable years involved in the computation of the tax credit earned.

1. From Separate to Joint Return. -- If a husband and wife, making a joint return for any taxable year, did not make a joint return for any of the taxable years involved in the computation of the tax credit earned, the separate tax credits apportioned in accordance with Subdivision 5.7.f of this Rule shall together be deemed a joint tax credit carryforward to such taxable year.

2. Continuous Use of Joint Return. -- If a husband and wife making a joint return for a taxable year made a joint return for each of the taxable years involved in the computation of the tax credit earned or the tax credit carryforward to such taxable years, the joint tax credit or tax credit carryforward to such taxable year is computed in the same manner as the tax credit carryforward of an individual as provided in Subdivisions 5.8.a through 5.8.c of this Rule.

3. From Joint to Separate Return. -- If a husband and wife making separate returns for a taxable year made a joint return for any, or all, of the taxable years involved in the computation of the tax credit earned or tax credit carryforward to such taxable year, the separate tax credit carryforward of each spouse to the taxable year is computed in accordance with Subdivisions 5.8.a through 5.8.c of this Rule but with the following modification: The tax credit of each spouse for a taxable year for which a joint return was made shall be deemed to be that portion of the joint tax credit apportioned to the spouse in accordance with Subdivision 5.7.f of this Rule.

4. Recurrent Use of Joint Return. -- If a husband and wife making a joint return for any taxable year made a joint return for one or more, but not all, of the taxable years involved in the computation of a tax credit carryforward to such taxable years, such tax credit carryforward to the taxable year is computed in the manner set forth in Paragraph 5.8.d.3. of this Rule. Such tax credit carryforward is considered a joint tax credit carryforward to such taxable year.

5. Joint Tax Credit Carryforwards. -- The joint tax credit carryforwards to any taxable year for which a joint return is made are all the tax credit carryforwards of both spouses to such taxable year.

6. Divorce and Remarriage. -- It is the intent of this Rule to allow the carryforward of joint tax credits to joint returns and of separate tax credits to joint returns so long as the two individuals remain married in both the taxable year in which the tax credit is earned and the taxable year to which the tax credit is to be carried. Divorce and remarriage in joint return cases present special problems. A joint tax credit of one couple cannot be carried to another taxable year and applied to the tax liability of a different couple. In applying the rules for joint returns of husband and wife and separate returns of husband and wife and in cases involving divorce and remarriage, the principles established under the Internal Revenue Code and Treasury Regulations, and interpretations thereof, for net operating loss carryovers and investment tax credit carryforwards may be used as a guide.

5.8.e. Tax Credits Not Assignable. -- No portion of the tax credit earned by any investor shall be subject in any manner to alienation, sale, transfer or assignment, except that tax credits authorized by the Authority for investments by a partnership, an S corporation, a limited liability company or individual joint investors may be apportioned pursuant to Subdivision 5.7.f of this Rule.

5.9. Investment to Date. -- The tax credit provided for in W. Va. Code §5E-1-8 is available only to those investors whose investment in a

Qualified West Virginia Capital Company occurs on or after the first day of July 1986.

5.10. Recapture. -- If the amount invested by the investor is not used by the Qualified Company for qualified investments as required by the Act and this Rule, the investor shall not be subject to a recapture provision for any credit claimed by him to date. However, the Qualified Company shall be subject to the penalty imposed under W. Va. Code §5E-1-12 and Subsection 7.6 of this Rule.

**§ 117-1-6. Investment Requirements, Reporting, Record Keeping, Prohibitions and Sale or Liquidation.**

6.1. Investments. -- A Qualified Company shall invest each separate capital base in Qualified Investments in accordance with the schedule set forth in Subsection 6.3 of this Rule. The portion of each separate capital base of a Qualified Company not required to be invested in Qualified Investments under Subsection 6.3 shall be maintained or invested by the Qualified Company in one or more of the following: (i) in Qualified Investments; (ii) in bank accounts and financial institutions which are located in the State of West Virginia; and (iii) such other interest bearing instruments with a maturity of less than one (1) year which are obtained from and managed by a West Virginia corporation, as defined in Subdivision 3.2.c of this Rule. After a Qualified Investment is made, the Qualified Company must obtain and submit to the Authority with the next semi-annual report of said Company, required to be filed pursuant to Subsection 5.1 of this Rule, affidavits prepared by any authorized officer, partner, limited liability company member or manager, or trustee of the business invested in, which affidavits set forth the following:

6.1.a. That it is a business located in or principally based in West Virginia;

6.1.b. That more than fifty percent (50%) of its assets and operations, as defined in Subsection ~~2.26~~ ~~2-29~~ of this Rule, are located in West Virginia;

6.1.c. That more than fifty percent (50%) of its employees are West Virginia residents; and

6.1.d. A brief description of the activities the business is engaged in.

6.2. Affidavit from Qualified Company. -- A Qualified Company shall submit to the Authority, contemporaneous with the filings required under Subsection 6.1 of this Rule, affidavits prepared by an authorized officer, partner, limited liability company member or manager, or trustee of the Qualified Company which demonstrate:

6.2.a. That the business invested in is not a business engaged in an activity prohibited by Subsection 6.5 of this Rule;

6.2.b. That the business invested in is a West Virginia Business as defined in Subsection ~~2.26~~ ~~2-29~~ of this Rule; and

6.2.c. That the West Virginia Business invested in is engaged in activities that meet the requirements of a Qualified Investment, as specified in Subsection ~~2.21~~ ~~2-22~~ of this Rule.

6.3. Schedule of Qualified Investments. -- A Qualified Company must invest each capital base in Qualified Investments according to the following schedule:

6.3.a. At least thirty-five percent (35%) of its capital base within one (1) year of the date on which the Qualified Company was designated as a Qualified West Virginia Capital Company by the Authority or, relative to a separate capital base designated as qualified pursuant to Subsection 4.1 of this Rule, within one (1) year of the date on which that separate capital base was designated as qualified by the Authority;

6.3.b. At least fifty-five percent (55%) of its capital base within two (2) years of the date on which the Qualified Company was designated as a Qualified West Virginia Capital Company by the Authority or, relative to a separate capital base designated as qualified pursuant to Subsection 4.1 of this Rule, within two (2) years of the date on

which that separate capital base was designated as qualified by the Authority; and

6.3.c. At least seventy-five percent (75%) of its capital base within three (3) years of the date on which the Qualified Company was designated as a Qualified West Virginia Capital Company by the Authority or, relative to a separate capital base designated as qualified pursuant to Subsection 4.1 of this Rule, within three (3) years of the date on which that separate capital base was designated as qualified by the Authority.

6.4. Limitation of Qualified Investment. -- No more than thirty percent (30%) of the total equity raised by a Qualified Company may be invested in any one West Virginia Business. For purposes of this Subsection, equity shall mean the total of all the capital bases designated as qualified by the Authority. ~~The investment by a Qualified Company of an entire separate capital base, or any part thereof, in a SBIC does not violate W. Va. Code §5E-1-13(a) or this Subsection, provided investments by the SBIC fully satisfy the requirements of the Act and this Rule as if the Qualified Company, itself, had made such investments.~~

6.5. Investment in Certain Businesses Prohibited.

6.5.a. A Qualified Company shall not invest any of its capital base in any of the following businesses:

1. Banks;
2. Savings & Loan Associations;
3. Credit Companies;
4. Financial or Investment Advisors;
5. Brokerage or Financial Firms;
6. Other Capital Companies; provided, however, a SBIC in which all or part of a Qualified Company's capital base is invested shall not be deemed a "Capital Company" for purposes of this Paragraph;

7. Charitable and religious institutions;

8. Businesses engaged in conventional oil and gas exploration;

9. Insurance Companies;

10. Businesses engaged in Residential Housing or Development; and

11. Any other business which the Authority determines to be against the public interest, the purposes of the Act or in violation of any law.

6.5.b. For the purposes of Paragraph 6.5.a.10 of this Rule, "residential housing or development" shall not include "tourism." "Tourism", as referred to in Subsection ~~2.21~~ ~~2.22~~ of this Rule, shall include, by way of example and not by way of limitation, housing which is to be sold as second residences or which is rented or leased to the public for overnight stay and which in either event is located near an established tourism resort. A Qualified Company desiring to make a "tourism" investment pursuant to this Subdivision or Subsection ~~2.21~~ ~~2.22~~ shall obtain certification from the Authority that such investment is eligible for qualification as a "tourism" investment prior to making such investment.

6.6. Alter Ego Investments Prohibited. -- W. Va. Code §5E-1-13(b) prohibits a Qualified Company from investing any portion of its capital base, or making other investments, in a business that is the "alter ego" of the Qualified Company.

6.6.a. Relative. -- For purposes of Subsection 6.6 of this Rule, the term "Relative" means a blood relative, a spouse, a spouse of a Blood Relative, or a person who is a Relative of a spouse, including persons so related by a step or adoptive relationship, or a member of a common household. The term "Blood Relative" shall include lineal descendants, ancestors, brothers and sisters, nephews and nieces, uncles and aunts, and first cousins.

6.6.b. Substantially Related. -- A business is an alter ego of a Qualified Company if

ownership of the business and ownership of the Qualified Company are "substantially related". Ownership of a business and ownership of a Qualified Company are "substantially related" if one or more of the following conditions are present at the time the investment is made or while the investment is outstanding:

1. Any investor in the Qualified Company is, or is a Relative (as defined in Subdivision 6.6.a of this Rule) of, an investor in or owner of the business. An investor in any parent business shall be deemed an investor in all subsidiaries thereof for the purposes of this Paragraph.

EXAMPLE:

A Qualified Company is formed with A, B and C as investors. Qualified Company makes an investment in a West Virginia Business. For the purposes of Paragraph 6.6.b.1 of this Rule, the West Virginia Business would not be an "alter ego" of the Qualified Company as long as: (i) neither A, B nor C is an investor or owner of the West Virginia Business, and; (ii) no blood relative, spouse, spouse of a blood relative, relative of a spouse, or member of the household of either A, B or C is an investor or owner of the West Virginia Business.

2. There is an agreement, written or oral, between the Qualified Company and the business that the investment by the Qualified Company in the business is conditioned upon the business (1) entering into any contract, agreement or other arrangement with an investor in the Qualified Company or a Relative (as defined in Subdivision 6.6.a of this Rule) of such an investor, or with any business owned or controlled by an investor in the Qualified Company or a Relative of such an investor, or (2) applying the invested funds to a purpose that will, clearly and naturally, substantially benefit an investor in the Qualified Company, a Relative of such an investor, or any business owned or controlled by an investor in the Qualified Company or a Relative of such an investor;

EXAMPLE 1:

A Qualified Company is formed with A, B and C as investors. Qualified Company's investment in XYZ, a West Virginia Business, is conditioned upon XYZ entering into a contract with Company Q, a business owned or controlled by investor B. Qualified Company would be prohibited from investing in XYZ on these conditions.

EXAMPLE 2:

Qualified Company is formed with A, B and C as investors. Qualified Company's investment in XYZ, a West Virginia Business, is conditioned upon XYZ using the investment to install certain equipment that will necessitate the use of supplies sold exclusively by Company Q, a business owned or controlled by Investor B. Qualified Company would be prohibited from investing in XYZ on these conditions.

3. The investment by the Qualified Company is conditioned upon a reciprocal investment by another West Virginia Qualified Company in a business owned or controlled by an investor in the Qualified Company;

4. The investment by the Qualified Company results in there being either (i) no equity ownership in the business other than the Qualified Company or (ii) the non-Qualified Company ownership in the business lacks economic substance.

EXAMPLE 1:

Qualified Company owns ninety percent (90%) of XYZ, a West Virginia Business. The remaining ten percent (10%) ownership in XYZ is owned by an individual, M, who received his shares at no cost to him, and an individual, N, to whom Qualified Company loaned the money needed to purchase N's shares. The loan to N is on a non-recourse basis, meaning that N has no personal liability to repay the loan. The non-Qualified Company ownership by M and N in XYZ

"lacks economic substance" and, pursuant to Paragraph 6.6.b.4 of this Rule, ownership of XYZ and Qualified Company are "substantially related." Therefore, XYZ would be an "alter ego" of Qualified Company and Qualified Company's investment in XYZ would be prohibited.

EXAMPLE 2:

Qualified Company owns eighty-five percent (85%) of the stock of XYZ, a West Virginia Business which manufactures widgets. Qualified Company paid \$85,000.00 for its stock. The remaining fifteen percent (15%) of the stock is owned by an individual, K, who received his share by contributing to XYZ machinery used to manufacture widgets, which machinery has been appraised at \$15,000.00. The non-Qualified Company ownership by K does not "lack economic substance" and, pursuant to Paragraph 6.6.b.4 of this Rule, XYZ would not be an "alter ego" of Qualified Company.

EXAMPLE 3:

Qualified Company owns ninety shares (equaling ninety percent (90%)) of the stock of XYZ, a West Virginia Business. Qualified Company paid \$90,000.00 or \$1,000.00 per share for its stock. The remaining ten shares (or ten percent (10%)) of the stock of XYZ are owned by an individual, D, who bought such stock for \$10.00 or \$1.00 per share. Furthermore, Qualified Company and D have an agreement by which Qualified Company has the right to buy D's shares in XYZ at any time for \$1.00 per share. The non-Qualified Company ownership by D "lacks economic substance" under Paragraph 6.6.b.4 of this Rule for two reasons: (i) D's investment of \$10.00 in XYZ is so minimal that D's investment is risk-free, and (ii) D's agreement with Qualified Company may result in D not receiving the benefits of ownership in XYZ.

6.6.c. Control of Board of Directors. -- A business is an alter ego of a Qualified Company if the board of directors of the business is controlled

by the Qualified Company, unless control consists of no more than a simple majority of the board. In order to determine control, directors of the business that exercise control on behalf of the Qualified Company will include directors of the business that are (i) employees, officers, directors, limited liability company managers or other management personnel of the Qualified Company; (ii) persons who are investors in the Qualified Company; or (iii) persons who are Relatives (as defined in Subdivision 6.6.a of this Rule) of an investor in, or employee, officer, director, limited liability company manager or other management official of, the Qualified Company. Non-Qualified Company directors shall include individuals who do not meet the preceding conditions. If the business is not a corporation then the same rules concerning control shall apply to the managing body for the business.

6.7. Management Interlock Prohibited.

6.7.a. General Rule. -- Except when required in order to remedy problems arising from a lack of profitability in the business or from dishonesty of the persons managing the business or from the death or unanticipated departure of a person occupying a key management position in the business, a Qualified Company is prohibited from managing any business in which the Qualified Company has invested. Therefore, unless otherwise provided, no investor, director, officer or employee of the Qualified Company can occupy a management position in such a business. A "management position" shall include any position or office, other than membership on the board of directors, however described by title or office, where the individual has responsibility for and authority over all or any portion of the day-to-day operations of the business. In the case of a general partnership or a limited liability company, a general partner or member shall not be deemed to occupy a management position in the business merely because such general partner or member regularly exercises his voting rights as long as such general partner or member is not responsible for and does not have authority over all or any portion of the day-to-day operations of the business.

## EXAMPLE:

Qualified Company is one of five general partners in a general partnership which is a West Virginia Business. By written agreement within the partnership or by written contract, a general partner other than Qualified Company is designated the "Managing Partner" and is given authority over the day-to-day operations of the partnership. Given the above, Qualified Company does not occupy a management position in the West Virginia Business even though Qualified Company would exercise its right to vote on the person who would occupy the position of Managing Partner.

6.7.b. Lack of Profitability Exception. -- In order to establish that occupation of management positions is required in order to cure a lack of profitability in the business, the Qualified Company must be able to demonstrate that the expenses of the business have exceeded the revenues of the business for two consecutive fiscal quarters. If the Qualified Company takes control of management of the business, such control shall be relinquished within a reasonable time after the revenues of the business have exceeded the expenses of the business for two consecutive fiscal quarters. In no event shall the Qualified Company have control of management of the business for a period exceeding twenty-four (24) months, even if profitability is not restored at the end of such twenty-four (24) month period.

6.7.c. Cure of Dishonesty Exception. -- In order to establish that occupation of management positions is required in order to cure dishonesty within management, the Qualified Company must be able to demonstrate that there is substantial reason to believe that existing members of management have violated state or federal law in connection with the performance of their duties for the business, that the suspected violations pose a significant risk of detriment to the business, and that an independent investigation of the suspected wrongdoing was undertaken, the results of which indicate the occurrence of a violation of law. Breach of fiduciary duty and negligence without more do not constitute "dishonesty." Where dishonesty in management is established, an

investor, director, officer or employee of the Qualified Company may serve as an interim replacement of existing management for a maximum period of six (6) months.

6.7.d. Death or Departure Exception. -- In situations involving the death or unanticipated departure of a person occupying a key management position in the business, an investor, director, officer or employee of the Qualified Company may serve as an interim replacement of such person for a maximum period of six (6) months.

6.8. Conflict of Interest. -- No officer, member, or employee of the Authority shall be financially interested, directly or indirectly, in any Qualified Company.

## 6.9. Limitation on Financial Institutions.

6.9.a. No more than forty-nine percent (49%) of the total capital base of any Qualified Company may be owned by banks, savings and loan associations, savings banks, or other financial institutions, or any affiliate thereof, as investors. For the purposes of Subsection 6.9 of this Rule, "total capital base" shall mean the total of all the capital bases designated as qualified by the Authority.

6.9.b. The following shall be an "affiliate" of a bank, savings and loan association, savings bank, or other financial institution for purposes of Subsection 6.9 of this Rule and W. Va. Code §5E-1-20:

1. A holding company of such financial institution;
2. A wholly owned subsidiary of such financial institution;
3. A corporation, partnership or other entity of which such financial institution has majority ownership;
4. A member of the same controlled group (as defined for federal income tax purposes) as the bank, savings and loan association, savings bank, or other financial institution.

6.9.c. No officer, employee, or director of a financial institution, or any affiliate thereof, may serve on the board of any Qualified Company. If the Qualified Company is not a corporation, then the restriction shall also apply to the managing body of the Qualified Company.

#### 6.10. Sale or Liquidation of Qualified Investments.

6.10.a. Maintenance of Investment. -- A Qualified Company shall maintain its Qualified Investments for a period of at least five (5) years, except that a Qualified Company receiving repayment or return of a Qualified Investment (exclusive of interest, dividends or other earnings on the investment) shall reinvest the company's repaid or returned cost basis in the investment in a Qualified Investment which remains outstanding for a period of time at least equal to the remainder of the initial five-year term, with reinvestment to be made within twenty-four (24) months from the date of repayment or return, unless a waiver is obtained from the Authority prior to the end of said twenty-four (24) month period; provided that, such returned amounts may be accumulated for six (6) months before the aforesaid twenty-four (24) month period commences.

1. Debt Investment. -- For purposes of Subdivision 6.10.a of this Rule and W. Va. Code §5E-1-12(b), a debt investment, as defined at Subsection 2.10 of this Rule, shall be considered to be "maintained" for the required five-year period (i) to the extent of the amount written off, when the debt investment becomes uncollectible and is written-off by the Qualified Company; (ii) to the extent of amounts repaid, when the unpaid balance is subsequently written-off and installment payments received by the Qualified Company each year did not exceed thirty percent (30%) of the original principal balance or, if such payments did exceed such thirty (30%) limit, they were determined by a normal amortization schedule based upon at least a five (5) year term; or (iii) to the extent of the entire investment, when such debt investment is not repaid in full for at least five (5) years and installment payments received by the Qualified Company each year during the required five-year period do not exceed thirty percent (30%)

of the original principal balance, except that installment payments received by the Qualified Company each year during the required five-year period may exceed thirty percent (30%) of the original principal balance if such installment payments are determined by a normal amortization schedule. If a Qualified Company receives installment payments during any one year of the required five-year period, not determined by a normal amortization schedule, which exceed thirty percent (30%) of the original principal balance of the debt investment, or if a Qualified Company receives repayment in full of a debt investment prior to the end of the five (5) year period, the Qualified Company shall reinvest all repaid principal pursuant to Subdivision 6.10.a of this Rule and W. Va. Code §5E-1-12(b), but the amount of any remaining unpaid principal balance will remain a Qualified Investment and need not be reinvested if thereafter maintained in compliance with this Rule and the Act. For purposes of Subdivision 6.10.a of this Rule, "normal amortization" represents the regular and equal payment necessary to be made at the end of each period that will repay both the interest on the loan and the original loan amount.

#### EXAMPLE 1:

A. Qualified Company makes a \$100,000.00 qualified debt investment with a stated maturity date of five (5) years in XYZ, a West Virginia Business. XYZ makes payments to Qualified Company so that the following amounts of the principal balance are repaid in the first two (2) years:

Year 1: \$10,000.00 principal repaid

Year 2: \$31,000.00 principal repaid

B. The repayment of \$31,000.00 of principal in Year 2 violates the thirty percent (30%) limitation in Paragraph 6.10.a.1 of this Rule if the payment would exceed payments under a normal amortization schedule.

C. Given that the Year 2 payments exceed payments under a normal amortization schedule, Qualified Company would be

required to reinvest \$41,000.00 (principal payments received in Years 1 and 2) pursuant to Subdivision 6.10.a of this Rule and W. Va. Code §5E-1-12(b). The remaining \$59,000.00 in principal owed would remain a Qualified Investment as long as the provisions of this Rule and the Act are followed.

EXAMPLE 2:

A. Qualified Company makes a \$100,000.00 qualified debt investment with a stated maturity date of five (5) years in XYZ, a West Virginia Business. XYZ makes payments to Qualified Company so that the following amounts of the principal balance are repaid in the first four (4) years:

Year 1: \$25,000.00 of principal repaid

Year 2: \$25,000.00 of principal repaid

Year 3: \$25,000.00 of principal repaid

Year 4: \$25,000.00 of principal repaid

B. The repayment of principal in Years 1 - 4 does not violate the thirty percent (30%) limitation of Paragraph 6.10.a.1 of this Rule. However, since the entire principal balance has been repaid by the end of Year 4, the investment has not been maintained for at least five (5) years and, therefore, must be reinvested pursuant to Subdivision 6.10.a of this Rule and W. Va. Code §5E-1-12(b).

EXAMPLE 3:

A. Qualified Company makes a \$100,000.00 qualified debt investment with a stated maturity date of five (5) years in XYZ, a West Virginia Business. XYZ makes payments to Qualified Company so that the following amounts of the principal balance are repaid in the first two (2) years:

Year 1: \$10,000.00 principal repaid

Year 2: \$15,000.00 principal repaid

B. In Year 3, the remaining \$75,000.00 of principal due on this debt investment becomes uncollectible and is written-off by Qualified Company as a bad loan. The entire debt investment is considered maintained for the required five-year period and no reinvestment of any portion of this investment is required.

2. Early Repayment. -- A Qualified Company which is unable to maintain a Qualified Investment for the required five-year period due to voluntary repayment of the investment in full by the West Virginia business in advance of the required five-year period, repayment in advance of the required five-year period due to default by the West Virginia business and acceleration of the loan, or otherwise, must reinvest its repaid or returned cost basis in the investment as is required by W. Va. Code §5E-1-12(b) and Subdivision 6.10.a of this Rule.

3. Equity Investment. -- For purposes of Subdivision 6.10.a of this Rule and W. Va. Code §5E-1-12(b), an equity investment, as defined at Subsection 2.16 of this Rule, shall be considered to be "maintained" for the required five-year period, to the extent of the amount not recovered and written-off, upon the dissolution, liquidation or other termination of operations of the West Virginia business.

4. Waiver. -- A Qualified Company desiring a waiver from the Authority of its obligation to reinvest its repaid or returned cost basis from a Qualified Investment which has not been maintained for the required five-year period pursuant to W. Va. Code §5E-1-12(b) and Subdivision 6.10.a of this Rule shall request such waiver in writing and send the request by certified mail to the Authority at the following address: West Virginia Economic Development Authority, 1018 Kanawha Blvd., Suite 501, Charleston, WV 25301-2828. The request shall contain the name, mailing address, and telephone number of a person that can be contacted by the Authority for further information concerning the request. The Qualified Company shall provide any additional information requested by the Authority regarding a waiver request.

6.10.b. Sale or Liquidation. -- A Qualified Company may sell or liquidate a Qualified Investment which has been maintained for the required five-year period; however, the initial cost basis of the Qualified Investment shall be maintained or invested by the Qualified Company in one or more of the following:

1. In Qualified Investments;
2. In bank accounts and financial institutions which are located in the State of West Virginia; and
3. Such other interest bearing instruments with a maturity of less than one (1) year which are obtained from and managed by a West Virginia corporation, as defined in Subdivision 3.2.c of this Rule.

6.11. Equity Capitalization Over Four Million Dollars. -- If a Qualified Company raises capital in excess of Four Million Dollars in a fiscal year, the capital in excess of Four Million Dollars does not constitute a part of the capital base of said company and is not subject to the restrictions and requirements of Section 6 of this Rule.

6.12. Special SBIC Investor Rules:

~~6.12.a. Qualified Company with SBIC Status. -- A SBIC Investor designated as a Qualified Company may retain all or any part of its capital base, and need not invest such sums in another SBIC, if the Qualified Company has obtained SBIC status. A Qualified Company with SBIC status shall make Qualified Investments in full compliance with the Act and this Rule, as well as with the federal Small Business Investment Act, 15 U.S.C. §§ 661 et seq., as amended, and the federal regulations promulgated thereunder.~~

~~6.12.b. SBIC Investor and SBIC Investment Requirements. -- The capital base of any SBIC Investor designated as a Qualified Company, the separate capital base designated as qualified of a SBIC Investor previously designated a Qualified Company, and the entire capital base of a SBIC Investor previously designated a Qualified Company for whom an increase to capital base is~~

~~designated as qualified shall be invested in accord with all provisions of the Act and this Rule by:~~

~~1. The Qualified Company, provided that, investments by the Qualified Company in one or more SBICs shall be considered as investments in West Virginia businesses; and~~

~~2. The one or more SBICs in which the capital base is invested, as if each such SBIC is a separate Capital Company with a capital base equal to the amount invested by the Qualified Company in that SBIC (except to the extent the requirements of the federal Small Business Investment Act, 15 U.S.C. §§ 661 et seq., as amended, and the federal regulations promulgated thereunder are in direct conflict with the Act and this Rule). In the event a SBIC fails to comply with the requirements of Subdivision 6.12.b of this Rule, the Qualified Company whose capital base is invested in the SBIC shall be deemed to have failed to comply with the provisions of the Act and this Rule, and shall be subject to all penalties provided therefor.~~

~~6.12.c. SBIC Investor Reporting Requirements. -- After an investment is made by a Qualified Company in a SBIC, the Qualified Company shall include in its next semi-annual report submitted pursuant to Subsection 5.1 of this Rule (1) a statement of the amount invested in any one or more SBICs, (2) the identity of such SBICs, and (3) documentation sufficient to satisfy the Authority that such SBICs have been approved as SBICs by, and remain in good standing with, the federal Small Business Administration. After a SBIC in which any Qualified Company's capital base is invested has invested funds in one or more third parties, any Qualified Company whose capital base is invested in such SBIC shall include in its next semi-annual report submitted pursuant to Subsection 5.1 of this Rule a statement of investments made by the SBIC (including the amount and recipient of such investment) and the percentage of each investment allocable to the Qualified Company's investment in the SBIC. Calculation of the percentage shall be determined by dividing the then unallocated amount of the Qualified Company's investment in the SBIC by the total investments in the SBIC by all parties~~

available for investment immediately preceding the SBIC's investment at issue.

**EXAMPLE:**

~~In year one, Qualified Company invests 5X dollars in SBIC, and others invest 2X dollars in SBIC. Thereafter, SBIC invests 3X dollars in business A and 1X dollars in Business B. The percentage of each investment allocable to Qualified Company is 71%, and is calculated by dividing the then unallocated investment of Qualified Company, 5X dollars, by the total investments of the SBIC available for investment, 7X dollars (5+2=7). Hence, in year one, 71% of the 3X dollar investment in Business A, or 2.14X dollars is allocable to Qualified Company's investment in SBIC, and 71% of the 1X dollar investment in Business B, or .71X dollars, is allocable to Qualified Company's investment in SBIC, for a total allocation of 2.85X dollars. In year two, Qualified Company invests an additional 4X dollars in SBIC, and others invest an additional 2X dollars in SBIC. In that year, SBIC invests 3X dollars in each of Businesses D, E and F. The percentage of each year two investment allocable to Qualified Company is 68%, calculated by dividing the then unallocated investment of Qualified Company, 6.15X dollars (4X dollar year two investment plus 2.15X dollars unallocated from year one (5X dollars total year one investment - 2.85X dollars allocated in year one = 2.15X dollars unallocated)), by the total investment in the SBIC available for investment, 9X dollars (Qualified Company's 4X dollar year two investment plus others' 2X dollar year two investment + 3X dollars remaining uninvested from year one investments). Hence, 68% of the 3X dollar investment in each of Businesses D, E, and F, or 2.05X dollars, is allocable to Qualified Company's investment in SBIC, for a total year two allocation of 6.15X dollars. The total investment by Qualified Company (5X dollars in year one and 4X dollars in year two, a total of 9X dollars) has thus been accounted for (2.85X dollars in year one and 6.15X dollars in year two):~~

~~After a SBIC in which a Qualified Company's capital base is invested has invested funds in one or more third parties, the Qualified Company shall obtain and submit affidavits prepared by officers, partners or managers of all third parties in which such investments were made, and affidavits prepared by authorized officials of the SBIC, pursuant to Subsections 6.1 and 6.2 of this Rule, as if the SBIC were a Qualified Company and the third parties were businesses invested in by the Qualified Company.~~

**§117-1-7. Audits, Reports, Confidentiality, Examination, Failure to Comply, Penalties, Decertification.**

7.1. Annual Audit and Report. -- For each Qualified Company, an audit of each of its capital bases designated as qualified shall be conducted annually by a certified public accountant, beginning at the end of the first fiscal year of the Company, and each year thereafter until the Qualified Company is decertified by the Authority. An audit of any of a Qualified Company's capital bases may be consolidated and submitted with audits of any other of its capital bases required under this Subsection, so long as information required under the Act and this Rule with respect to each capital base is separate and distinct. Provided that, in the case of the capital base of a Qualified Company designated as such, or a separate capital base or increase to capital base designated as qualified, prior to the 1991 amendments to the Act, audits with respect to the capital bases so qualified need not be conducted after the expiration of a five year period beginning from the date of the last of such designations if the Qualified Company is not then actively investing but is instead merely maintaining existing investments pursuant to the requirements of the Act and this Rule. In such cases, in lieu of audits, the Qualified Company shall annually file internally prepared unaudited financial statements accompanied by an affidavit setting forth (1) the name of the Qualified Company; (2) the name and title of the affiant; (3) that the affidavit is submitted in connection with the internally prepared financial statements of the Qualified Company; (4) the time period covered by the financial statements; (5) that there have been no

material or significant changes in the Qualified Company's Qualified Investments for the time period specified, or what, if any, such changes have occurred; and (6) that the financial statements are true, complete and accurate.

7.2. General Requirements for Audits. -- The following requirements shall apply to Audits of the Qualified Company:

7.2.a. Independent CPA. -- The certified public accountant must be independent of the Qualified Company being examined to ensure that the audit report will be impartial, in fact and in appearance.

7.2.b. Working Papers; Standards. -- In performing the audit, the accountant must prepare working papers in accordance with the generally accepted accounting standards of field work. Working papers for an audit must be retained by the accountant for a minimum of three (3) years from the date of the audit report, or longer if so notified in writing by the Authority before the end of the three (3) year period. The working papers shall be made available upon written request of the Authority or the Director. The audit shall be conducted in accordance with generally accepted auditing and accounting principles and such other guidelines as the Authority may prescribe.

7.2.c. Report Contents. -- The audit report must address the methods of operation and conduct of the business of the Qualified Company and report on the Qualified Company's compliance with the requirements of the Act and this Rule. In particular the report shall address whether the company has made proper and timely investments. Any instances of noncompliance must be specifically cited. If the accountant finds that the Company has been in compliance, the accountant must make a positive statement to that effect.

7.2.d. Submission of Report. -- Three certified copies of the audit report shall be submitted to the Authority no later than ninety (90) days from the end of each fiscal year, together with three copies of a descriptive narrative of the Qualified Company's activities, its methods of

operation and the general conduct of the Company, and three copies of its financial statements.

7.2.e. Bound Report. -- Each copy of the audit report and narrative statement must be bound in a durable cover. The name of the Qualified Company and the time period covered by the report must be visibly printed on the front cover of the report.

7.2.f. Other Requirements. -- Other requirements the Authority may dictate from time to time.

### 7.3. Confidentiality.

7.3.a. General Rule. -- All information submitted to the Authority shall be considered confidential and not subject to public disclosure when filed with the Authority, except as otherwise provided in Subsection 7.3 of this Rule and in §§5E-1-8 and 5E-1-21 of the Act.

7.3.b. Application Information. -- All information submitted to the Authority pursuant to (i) application for designation as a Qualified Company (ii) application for designation as qualified of a separate capital base pursuant to Subsection 4.1 of this Rule, and (iii) application for designation as qualified of an increase to capital base pursuant to Subsection 4.2 of this Rule, and documents related to such applications, shall be considered confidential and not subject to public disclosure when filed with the Authority, except the following:

1. The full legal name of the entity making the application;
2. The mailing and office addresses and telephone number of such applicant;
3. The name of a person to contact for such applicant;
4. The names of all directors, officers, managers or managing partners of such applicant;
5. Whether such applicant has the policy of restricting its investment to particular

areas of the state, and if so, a description of the particular areas, or whether the applicant has no such restriction and may invest statewide;

6. Whether such applicant has the policy of restricting the type of its investments to debt investments, equity investments, capital leases or any combination of such investments; and

7. The amount of the capital base of such applicant designated as qualified by the Authority.

7.3.c. Report Information. -- All information submitted to the Authority in regard to the semi-annual reports required by Subsection 5.1 of this Rule, including the affidavits required under Subsections 6.1 and 6.2 of this Rule, shall be considered confidential and not subject to public disclosure when filed with the Authority, except the following:

1. The name of any Qualified Company that made a Qualified Investment;

2. The name, address and phone number of each West Virginia Business receiving a Qualified Investment, specified as to the investing Qualified Company;

3. Whether each Qualified Investment from the Qualified Company was a debt investment, equity investment, capital lease or combination of such investments, specified as to the West Virginia Business;

4. The qualified activity under Subsection ~~2.21~~ ~~2.22~~ of this Rule in which each West Virginia Business receiving a Qualified Investment from the Qualified Company is engaged, specified as to the West Virginia Business; and

5. Whether the amount of each Qualified Investment in a West Virginia Business is: (i) not more than \$50,000.00; (ii) more than \$50,000.00, but not more than \$100,000.00; (iii) more than \$100,000.00, but not more than \$250,000.00; (iv) more than \$250,000.00, but not more than \$500,000.00; (v) more than

\$500,000.00, but not more than \$1,000,000.00; or (vi) more than \$1,000,000.00, specified as to the West Virginia Business.

7.3.d. Ruling Request Information. -- All information submitted to the Authority regarding a ruling request pursuant to Section 9 of this Rule shall be considered confidential and not subject to public disclosure when filed with the Authority, except that the Authority may, if it so desires, publish or make available to the public a summary of such ruling request provided that all names and other identifying facts are omitted.

7.3.e. General Correspondence. -- All general correspondence of or to the Authority shall be considered confidential and not subject to public disclosure.

7.3.f. Examination & Audit Information. -- All information obtained by or submitted to the Authority in regard to the examination or audit (including audits performed by independent certified public accountants) of a Qualified Company pursuant to W. Va. Code §5E-1-16 and Subsections 7.1, 7.5 and 7.11 of this Rule shall be considered confidential and not subject to public disclosure, except where such public disclosure results from enforcement proceedings contemplated by W. Va. Code §5E-1-21(b) and (c).

7.3.g. Internal Information. -- Unless otherwise provided, all information generated internally by the Authority including, by way of example and not by way of limitation, internal memoranda and reports shall be considered confidential and not subject to public disclosure.

7.3.h. Tax Information. -- All tax returns and tax return information subject to the nondisclosure restrictions of W. Va. Code §11-10-5d shall be confidential, except for such information subject to disclosures authorized, mandated or permitted pursuant to W. Va. Code §§ 5E-1-8, 5E-1-21 or 11-10-5s.

7.3.i. Authority Determination. -- In addition to the above information classified as non-confidential, the Authority may from time to time

consider as non-confidential and disclose to the public any information by the execution of a resolution or policy statement that such information shall be non-confidential.

7.3.j. Request for Confidentiality. -- Any person or entity submitting information to the Authority which is classified as non-confidential by this Rule or the Act will be treated as non-confidential and subject to disclosure unless the person submitting the information makes a showing, satisfactory to the Authority, at the time the information is submitted that the information should be treated as confidential under W. Va. Code §5E-1-21(b). Any person desiring to make such a submission shall indicate in writing what information is requested to be treated in a confidential manner and the basis upon which such treatment is justified. A person making a request may submit the information desired to be treated as confidential separately from other information submitted. If the Authority concurs with the request then the information shall be treated as confidential. If the Authority disagrees with the requested treatment then the person submitting such information shall be so notified and given a reasonable opportunity to withdraw the information.

7.3.k. Disclosure to State Personnel. -- Notwithstanding any provisions of the Act or this Rule, any record, report, document or information may be disclosed to any officers, employees or authorized representatives of the State of West Virginia charged with administering the provisions of the Act and this Rule and may be disclosed pursuant to proceedings under W. Va. Code §5E-1-16(b) and Subsection 7.5 of this Rule; provided that, the provisions of the West Virginia Code regarding confidentiality and the disclosure of tax returns and tax information, including without limitation W. Va. Code §11-10-5d, apply to the Authority, its agents and employees and to information submitted to the Authority under the Act and this Rule.

7.4. Annual Authority Review. -- The Authority shall conduct an annual review of the accountant's report and audit required by W. Va. Code §5E-1-16(a) and Subsection 7.1 of this Rule

and any other information filed by a Qualified Company to determine if the company is abiding by the requirements of the Act and this Rule, to advise the company as to the qualified status of its investments, and to ensure that no investment has been made in violation of W. Va. Code §§5E-1-12 and 5E-1-13, and Section 6 of this Rule. The results of the annual review shall be used to notify the Tax Commissioner of any Qualified Companies that are not in compliance with the Act or this Rule.

7.5. Investigation by Authority. -- The Authority may examine, under oath, any of the officers, directors, partners, limited liability company members or managers, trustees, agents, employees or investors of a Qualified Company regarding the methods of operation and business of the company, and any other matters which the Authority may deem necessary to ensure compliance with the Act and this Rule. The Authority may issue subpoenas and subpoenas duces tecum, and administer oaths relative to any such examination.

7.6. Non-Compliance Penalty. -- Any Qualified Company that fails to make or maintain Qualified Investments pursuant to this Rule and the Act shall pay to the Tax Commissioner a penalty equal to all of the tax credits authorized on the capital base which the Qualified Company failed to properly invest or maintain with interest at the rate of 1-1/2% per month, compounded monthly, from the date said tax credits were certified as allocated to the West Virginia Qualified Company. The Tax Commissioner shall give notice to the Qualified Company of any penalties assessed hereunder. The Tax Commissioner may abate the penalties upon written request if the Qualified Company establishes reasonable cause for the failure to make or maintain Qualified Investments. The Tax Commissioner shall deposit any amounts received as penalties hereunder to the State general fund. To carry out the provisions of this Section, the Tax Commissioner shall have all powers and authority granted to him under the West Virginia Tax Procedures and Administration Act and the regulations promulgated thereunder and the penalty may be assessed and collected in the same

manner as other penalties are assessed and collected under that Act.

7.7. Involuntary Decertification. -- Failure of a Qualified Company to comply with the provisions of the Act or this Rule shall be grounds for decertification of the Company by the Authority pursuant to §5E-1-17 of the Act and this Subsection.

7.7.a. Notice. -- If at any time the Authority determines that a Qualified Company is not in compliance with the requirements of the Act or this Rule, the Authority shall give such Qualified Company written notice of such noncompliance and that the Qualified Company shall be decertified in ninety (90) days from the date of mailing of such notice unless the company satisfactorily corrects such actions of noncompliance or files a petition with the Authority for reconsideration and demands an administrative hearing. Such hearing shall be conducted as provided in W. Va. Code §29A-5-1.

7.7.b. Notice of Decertification. -- If a Qualified Company is not in compliance with the Act and this Rule following said ninety (90) day period provided by Subdivision 7.7.a of this Rule (unless an administrative hearing was demanded, in which case the Qualified Company will be provided a period to cure noncompliance beginning on the date of issuance of a decision supporting the Authority's decertification actions and equal to ninety (90) days less the number of days from issuance of the notice required by Subdivision 7.7.a of this Rule to the Qualified Company's filing of its petition and demand), the Authority shall send a notice of decertification to the Qualified Company and to the State Tax Commissioner. Involuntary decertification of a Qualified Company shall cause the forfeiture of any right or interest to qualification for further tax credits under the Act or this Rule for: (i) the decertified company; and (ii) any Applicant, or any Qualified Company seeking designation as qualified of a separate capital base or an increase in its capital base, in which any director, officer, general partner, managing partner, limited liability company member or manager or trustee of the decertified company is a director, officer, general

partner, managing partner, limited liability company member or manager, trustee or investor.

7.8. Voluntary Decertification Requested by Qualified Company. -- A Qualified Company, which has complied with the provisions of the Act and this Rule including the provisions of W. Va. Code §5E-1-12(b) and Subsection 6.10 of this Rule, desiring to terminate its status as a Qualified Company under the Act but to remain in existence and not to dissolve or liquidate pursuant to W. Va. Code §5E-1-12(c) or Section 8 of this Rule shall make written application to the Authority requesting decertification and the revocation of its status as a Qualified Company under the Act. Such written application for decertification shall provide information certifying that the Qualified Company has complied with the provisions of the Act and this Rule. A Qualified Company requesting decertification shall provide all information requested by the Authority. The Authority may perform an audit or examination of any Qualified Company requesting decertification in order to ascertain or verify the Qualified Company's compliance with the Act and this Rule. The standard to be used by the Authority to determine compliance with W. Va. Code §5E-1-12(b) and Subsection 6.10 of this Rule, will be whether the Qualified Company has maintained for at least five years individual Qualified Investments totaling (1) at least sixty percent (60%) of the capital base from which the investments were made, with regard to the initial capital base of a Qualified Company designated as such, or any separate capital base or increase to capital base designated as qualified, prior to the 1991 amendments to the Act; or (2) at least seventy-five (75%) of the capital base from which the investments were made, with regard to the initial capital base of a Qualified Company designated as such, or any separate capital base or increase to capital base designated as qualified, subsequent to the 1991 amendments to the Act.

7.9. Audits. -- In addition to the annual audit required under W. Va. Code §5E-1-16(a) and Subsection 7.1 of this Rule, the Authority and the Tax Commissioner may jointly audit any one or more Qualified Companies in any year on a random basis, or for cause, or for any other basis

the Authority and Tax Commissioner may select. In addition to any other right or power the Tax Commissioner may have to audit any business in which a Qualified Company has invested or proposes to invest, the Tax Commissioner may audit the business on a random audit selection basis, or for cause, or on any other basis the Tax Commissioner may select.

**§117-1-8. Dissolution or Liquidation of Qualified Company.**

8.1. General Rule. -- A Qualified Company may be dissolved or liquidated only after notice and approval of such dissolution or liquidation by the Authority. Such approval shall not be unreasonably withheld by the Authority. Unless waived by the Authority, no dissolution or liquidation of any Qualified Company may be made if such dissolution or liquidation would cause the provisions of Subsection 6.10 of this Rule or W. Va. Code §5E-1-12(b) to be violated. The standard to be applied by the Authority in determining whether dissolution or liquidation would cause such provisions to be violated is that set forth in Subsection 7.10 of this Rule.

8.2. Application Requirements. -- A Qualified Company desiring to dissolve or liquidate shall make written application to the Authority requesting the Authority's approval for such dissolution or liquidation. Such written application shall include the following:

8.2.a. A description of all Qualified Investments of the Qualified Company currently outstanding.

8.2.b. Information certifying that all Qualified Investments currently outstanding have been maintained or reinvested, pursuant to W. Va. Code §5E-1-12(b) and Subsection 6.10 of this Rule, for a period of at least five (5) years; or, if all Qualified Investments currently outstanding have not been so maintained or reinvested, those investments must be so identified.

8.2.c. Any additional information specified by the Authority.

8.3. Requests for Information. -- A Qualified Company applying for approval to dissolve or liquidate shall provide all information as may be requested by the Authority.

8.4. Compliance Audits. -- The Authority may perform an audit or examination of any Qualified Company requesting approval for dissolution or liquidation to ascertain or verify the Qualified Company's compliance with the Act and this Rule.

**§117-1-9. Ruling Procedure.**

9.1. General Rule. -- A Qualified Company or the organizers of a Qualified Company may request an informal ruling from the Authority concerning the application of the Act and this Rule to a specific set of facts and circumstances. The Authority will not issue rulings concerning the tax ramifications of investment in a Qualified Company. Tax ruling requests should be directed to the West Virginia Department of Tax and Revenue.

9.2. Request Requirements. -- A ruling request must meet the following requirements in order to be considered by the Authority:

9.2.a. The ruling request must be in writing and sent by certified mail to the Authority at the following address: West Virginia Economic Development Authority, 1018 Kanawha Blvd., Suite 501, Charleston, WV 25301-2828;

9.2.b. Any factual representations upon which the ruling will be based must be verified under oath;

9.2.c. The request must state the ruling that is requested and must contain legal analysis in support of the requested ruling;

9.2.d. The ruling must be accompanied by a non-refundable filing fee of three hundred dollars (\$300.00) per ruling requested;

9.2.e. The request must contain the name, mailing address and telephone number of a person

that can be contacted by the Authority for further information concerning the request; and

9.2.f. Any additional information requested by the Authority must be submitted in writing. Additional information must be verified under oath if it involves factual representations.

9.3. Publication of Rulings; Reliance; Modification. -- The Authority may publish or release summaries of previous rulings with facts or characteristics identifying the person or persons requesting the ruling omitted; however, the only persons who may rely upon a ruling by the Authority are those persons who requested and received the ruling. As to those persons, the Authority reserves the right to notify the recipient of the ruling at the recipient's last address known to the Authority that the subject ruling may no longer be relied upon as of the date of the notice. A ruling may be prospectively modified if the Authority determines that the ruling was incorrect or is in conflict with the Act, this Rule or any other substantive legal precedent.

9.4. Denial of Requests. -- The Authority may decline to issue a ruling and return the filing fee to the person requesting the ruling. From time to time, the Authority may announce those areas in which it will not issue rulings.

#### **§117-1-10. Transition Rules.**

10.1. Given that the Act was substantially amended during the regular session of the Legislature in 1991, the following provisions, along with W. Va. Code §5E-1-19, shall provide transition guidelines for Qualified Investments.

10.1.a. Until repaid, all Qualified Investments made prior to the effective date of the 1991 amendments to the Act shall remain unaffected by such 1991 amendments and shall be governed by the Act as it appeared at the time the Qualified Investment was made, and the Rules promulgated thereunder. Funds repaid or returned to a Qualified Company and reinvested pursuant to W. Va. Code §5E-1-12(b) and Subsection 6.10 of this Rule subsequent to such 1991 amendments shall be governed by such 1991 amendments.

10.1.b. A Qualified Investment made pursuant to any contract or agreement entered into prior to the effective date of the 1991 amendments to the Act by a Qualified Company whereby the Qualified Company agreed to make an investment or increase its investment in a West Virginia Business, with such investment or increase in investment to take place subsequent to the effective date of the 1991 amendments to the Act, shall remain unaffected by such 1991 amendments and shall be governed by the Act as it appeared at the time the contract or agreement was entered into, and the Rules promulgated thereunder.

10.1.c. Any refinancing or restructuring by a Qualified Company of a Qualified Investment which was made prior to the 1991 amendments to the Act shall remain unaffected by such 1991 amendments and shall be governed by the Act as it appeared at the time the Qualified Investment was initially made, and Rules promulgated thereunder; provided that, such refinancing or restructuring does not include any new investment by the Qualified Company.

10.1.d. Any Qualified Investment made by a Qualified Company on or after the effective date of the 1991 amendments to the Act shall be governed by the provisions of the Act as amended in 1991.

#### **§117-1-11. Examples.**

11.1. Any example provided in this Rule is provided merely to demonstrate a certain specific application of the rule it exemplifies. These examples do not, therefore, represent the exclusive application of any rule and in no way restrict the meaning or application of this Rule as it is interpreted by the Authority and any court or governmental agency of competent jurisdiction.