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(Plus all the volunteer
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July 27, 1998

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Economic Development Authority


RULE: Amendments, Series 1, General Administration of the West Virginia Capital Company Act: Establishment of the Application Procedures to Implement the Act

DATE FILED AS AN EMERGENCY RULE: July 16, 1998

DECISION NO. 5-98

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

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE July 27, 1998
ADMINISTRATIVE LAW DIVISION



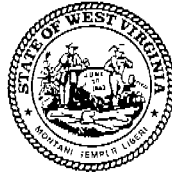
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EMERGENCY RULE DECISION
(ERD 5-98)

AGENCY: West Virginia Economic Development Authority
RULE: Amendments, Series 1, General Administration of the West Virginia Capital Company Act: Establishment of the Application Procedures to Implement the Act

FILED AS AN EMERGENCY RULE: June 16, 1998

- par. 1 The West Virginia Economic Development Authority (Authority) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 West Virginia Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [29A-3-15a].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Authority filed this emergency rule with supporting documents with the Secretary of State June 16, 1998 and with the LRMRC June 16, 1998.

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

par. 8 (B) Statutory Authority -- WV Code §5E-1-5 reads:

The authority shall promulgate rules in accordance with §29A-3-1 of this code, to carry out the policy and purposes of this article, to provide any necessary clarification of the provisions of this article, and to efficiently provide for the general administration of this article.

par. 9 It is the determination of the Secretary of State that the Authority has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- WV Code 29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Authority are as follows:

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 certifications 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, an emergency rule is the only available avenue for WVEDA to make the legislative rules correspond with the amended statute. It is therefore imperative that the provisions of the current legislative rules be amended by the emergency rule as soon as possible, but in any event no later than July 1, 1998.

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

Therefore, for the reasons stated above and because the Capitol Company Act has substantial effect on the fiscal well-being of the State, an emergency exists and an emergency rule is necessary for the immediate preservation of the public welfare, to comply with the effective date of the corresponding statutory provisions and to prevent substantial harm to the public interest.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "prevent substantial harm to the public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 5-98 or ERD 5-98 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Economic Development Authority, the Attorney General and the Legislative Rule Making Review Commission.



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THE SECRETARY OF STATE

THIS DATE July 27, 1998
ADMINISTRATIVE LAW DIVISION

Entered _____