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June 29, 2001

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Economic Development Authority

RULE: Amendments, 117CSR1, General Administration of the WV Capital Company Act: Establishment of the Application Procedures to Implement the Act

DATE FILED AS AN EMERGENCY RULE: June 12, 2001

DECISION NO. 3-01

Following review under W. Va. 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.

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EMERGENCY RULE DECISION
(ERD 3-01)

AGENCY: West Virginia Economic Development Authority
RULE: Amendments, 117CSR1, General Administration of the WV Capital Company Act: Establishment of the Application Procedures to Implement the Act

FILED AS AN EMERGENCY RULE: June 12, 2001

- par. 1 The West Virginia Economic Development Authority (WVEDA) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. 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: W. Va. 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 WVEDA filed this emergency rule with supporting documents with the Secretary of State June 12, 2001 and with the LRMRC June 12, 2001.

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

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

The authority shall promulgate rules in accordance with §29A-3-1 et seq. 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 WVEDA has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. 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 WVEDA are as follows:

The Capital Company Act, W. Va. Code §5E-1-1 et seq. (the "Act"), was amended during the 2001 Regular Session of the Legislature. The current legislative rules do not reflect the 2001 amendments of the statute. This emergency rule is submitted in order to assist in the general administration of the Act as amended in 2001.

The 2001 amendments to the Act were substantial and directly effect the application for and issuance of tax credits as well as other key issues. More specifically, W. Va. Code §5E-1-8 now provides that up to \$2.0 million in tax credits may be allocated by WVEDA during the first 30 days of each fiscal year to one or more small business investment companies ("SBICs"). The Act's 2001 amendments at W. Va. Code §5E-1-4(4) further require SBICs to be licensed as such by the U.S. Small Business Administration in order to apply for and receive a tax credit. The effect of the 2001 amendments to the Act is to prohibit the issuance of tax credits under the Act to applicants other than licensed SBICs. This rule, at Sections 3.10, 2.24 and 3.3.4 address these statutory amendments.

The 2001 amendments to the Act require that WVEDA must, during the period of July 1, 2001 to July 30, 2001, allocate tax credits to licensed SBICs which meet the application requirements. The emergency rule is the only avenue for WVEDA to make the legislative rules implement the amended statute before the application

process is completed and tax credits allocated. It is therefore imperative that the provisions of the current legislative rules be amended by this emergency rule. The 2001 amendments to the Act, at W. Va. Code §5E-1-6, 7 and 10, alter the qualifications, minimum standards and application requirements of the SBICs. These statutory amendments are reflected in Section 3 of the rule.

The rule, at Sections 6.3, 6.10 and 10.2 also provides transition rules for the application of other amendments to the Act in 2001 which are necessary for the administration of the Act in 2001.

Therefore, for the reasons stated above and because the Act as a tax credit program has a 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). . . "immediate preservation of the public welfare" and "to comply with a time limitation"

par. 14 This decision shall be cited as Emergency Rule Decision 3-01 or ERD 3-01 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 Committee.



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