

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: x Legislative Interpretive Procedural

Agency West Virginia Economic Development Authority Address Capitol Complex Building 6, Room 525, Charleston, West Virginia 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$	\$	\$
Personal Services	-0-	-0-	-0-	-0-	-0-
Current Expense	-0-	-0-	-0-	-0-	-0-
Repairs and Alterations	-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 objectives of these rules are: (1) to implement as Legislative Rules the Emergency Rules currently in effect, such Emergency Rules having replaced the prior rules which in many areas did not reflect but contradicted the West Virginia Capital Company Act, as amended, such amendments having become effective June 9, 1991 (the "Act"); (2) to provide necessary clarification of the provisions of the Act; and (3) to efficiently provide for the general administration of 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: September 18, 1991

Signature of Agency Head or Authorized Representative

David Warner

David Warner, Director
West Virginia Economic Development Authority

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

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

N/A

b. Date of hearing: N/A

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

David Warner

David Warner, Director
West Virginia Economic Development Authority

LEGISLATIVE WEST VIRGINIA ADMINISTRATIVE RULES
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY
CHAPTER 5E-1
SERIES 1

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

Section 1: General

1.1 Type of Regulations

These are ~~emergency~~ legislative rules as defined in West Virginia Code ~~§§~~ 29A-1-2(d).

1.2 Scope

These ~~emergency~~ legislative rules are 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 ~~Board of 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. These rules establish the application procedure for such designation by the Board

Authority, the general requirements for Qualified Companies, and the process for the authorization and use of the tax credits.

1.3 Authority

These emergency legislative rules are issued under the authority of West Virginia Code §§ 29A-1-2(d), and 5E-1-5.

1.4 Filing Date

These emergency legislative rules were promulgated and filed in the Office of the Secretary of State _____.

1.5 Effective Date

These emergency legislative rules became effective _____.

1.6 Citation

These emergency Legislative Rules may be cited as W. Va. Legis. Rules 5E-1, Ser. 1, § _____, page _____ (198-91).

1.7 Definitions

1.7.1 As used in these Rules:

1.7.1.1 Act shall mean the West Virginia Capital Company Act, Article I, Chapter 5E of the Code.

1.7.1.2 Applicant shall mean (1) a profit or non-profit entity, organized and existing under the laws of West Virginia, which is created for the purpose of making ~~venture~~ capital available for qualified investments or (2) a West Virginia business development corporation created pursuant to Article 14, Chapter 31 of the Code, that seeks to be designated by the Board as a Qualified Company. For purposes of this definition, entity includes, but is not limited to, a corporation (including an S Corporation), a partnership, and a trust.

1.7.1.3 Authorized Tax Credits shall mean the tax credits provided for in Code §5E-1-8.

1.7.1.4 ~~Board shall mean the Board of Directors of the West Virginia Economic Development Authority provided for in Article 2, Chapter 5C of the Code, the successor to the West Virginia Industry and Jobs Development Corporation pursuant to Article 15, Chapter 31 of the Code.~~ Authority shall mean the West Virginia Economic Development Authority, provided for in Article 15, Chapter 31 of the Code.

1.7.1.5 Capital Base shall mean 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 these Rules.

1.7.1.6 ~~Cash Equivalent~~ shall mean an interest bearing instrument with a maturity of less than one year. Capital Lease shall mean a lease meeting one or more of the following criteria:

1.7.1.6.1 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

1.7.1.6.2 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 term 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

1.7.1.6.3 Under generally accepted accounting principles, the lessee cannot treat payments to the capital company as payments under an operating lease; or

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

1.7.1.7 Qualified Certified West Virginia Capital Company or Qualified Certified Company shall mean (1) a West Virginia business development corporation created pursuant to Article 14, Chapter 31 of the Code; 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 ~~to~~ for qualified investments, ~~and qualified after having become qualified~~ by the Beard Authority.

1.7.1.8 Code shall mean the Code of West Virginia of 1931, as amended.

1.7.1.9 Complete Application shall mean an application that contains all of the information ~~and evidence~~ required by these Rules, as determined by the Director.

1.7.1.10 Debt or Debt Financing shall mean a loan instrument with a stated maturity date of at least five years and which shall be maintained by the Qualified Company for at least five years pursuant to Code §5E-1-12(b) and Subsection 5.10.1 of these Rules.

1.7.1.11 Decertification shall mean the action of the Beard Authority of revoking the Qualified Status from a Capital Company, in accordance with Section 6.9 of these Rules.

1.7.1.1112 Designate as a Qualified Company shall mean the action of the Board Authority in designating Certified Companies as Qualified Companies.

1.7.1.1213 Designate as Qualified shall mean the action of the Board Authority to authorize a separate capital base for a Qualified Company and to allocate tax credits for such separate capital bases.

1.7.1.1314 Development Corporation shall mean a West Virginia Business Development Corporation created pursuant to Article 14, Chapter 31 of the Code.

1.7.1.1415 Director shall mean the Executive Director of the West Virginia Economic Development Authority, or his designated representative.

1.7.1.1516 Equity or Equity Financing shall mean an ~~interest in a business represented by an instrument which: (i) is not called a note, bond, or debenture, (ii) does not entitle the holder to receipt of a fixed rate of interest, and (iii) is not secured by a letter of credit or guaranty of a financial institution or by specific property of the business as collateral, and which has at least three of the following features:~~

~~1.7.1.15.1 Dividends, redemptions or other payments or distributions to be made under the terms of the instrument to the holder are contingent (i.e. payable only out of earned surplus or at the discretion of the board of directors, managing partner or other governing body, or are payable only if payment would not impair the capital of the business or render the business insolvent).~~

~~1.7.1.15.2 The instrument is subordinate to all debt of the business.~~

~~1.7.1.15.3 The holder is not entitled to accelerate dividends, redemptions or other payments or distributions to be made to the holder under the terms of the instrument even if such payments are not made by the business in a timely manner.~~

~~1.7.1.15.4 The instrument entitles the holder to vote on some or all business matters or to participate in the management of the business, or the instrument is convertible to an instrument which entitles the holder to vote on some or all business matters or to participate in the management of the business.~~

~~1.7.1.15.5 The instrument is not guaranteed by shareholders, partners or other principals of the business.~~

~~1.7.1.15.6~~ The instrument is not freely negotiable or transferrable. common stock or preferred stock in a corporation purchased from the corporation and shall include warrants and options which upon exercise entitle the Qualified Company to common or preferred stock provided the warrant or option is purchased from the corporation. Equity shall also mean an ownership interest in a general partnership and ownership of limited partnership units in the case of a limited partnership. 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 years from purchase by the Qualified Company.

1.7.1.16¹⁷ Fiscal Year shall mean July 1 through June 30, which is the fiscal year of the State.

1.7.1.17¹⁸ Insurance Company shall mean any person engaged in the business of making contracts of insurance.

1.7.1.18¹⁹ Partnership shall include a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on; and the term partner includes a member of such syndicate, group, pool, joint venture or organization.

~~1.7.1.1920~~ Qualified Investment shall mean a debt or equity financing of any West Virginia business, other than those businesses prohibited by Subsection 5.5 of these Rules, which financing shall be for the purpose of increasing West Virginia employment and business opportunities while protecting the people's constitutional right to a clean and healthful environment. 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; 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 Subsection 5.5.2 of these Rules; 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 1.7.1.6 of these Rules, to a West Virginia Business lessee engaged in one of the above enumerated activities is a qualified investment.

1.7.1.2021 Qualified West Virginia Capital Company or Qualified Company shall mean a Certified West Virginia Capital Company that has been designated by the Board Authority as a Qualified Capital Company under the provisions of 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.

1.7.1.21~~22~~ Rules shall mean the Series One Legislative Rules promulgated pursuant to the Act.

1.7.1.22~~23~~ S Corporation or Subchapter S Corporation shall mean a small business corporation as defined in § 1361(b) of the Internal Revenue Code of 1954, as amended, for which an election under § 1362(a) of said Code is in effect.

1.7.1.23~~24~~ State shall mean the State of West Virginia.

~~1.7.1.24 Unsecured Debt shall mean debt for which the qualified company receives no security interest in any of the assets of the borrower nor any guarantee from the borrower, and for which no collateral or guarantee is required or obtained from any other party as a condition of the loan creating the debt.~~

1.7.1.25 West Virginia Business shall mean any business which is located in or is principally based in West Virginia, with more than fifty percent (50%) of its assets, and operations and employees 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.

Section 2. Procedure to Become a Qualified West Virginia Capital Company

2.1 General Procedure. For purposes of implementing the tax credit program established by the Act and to facilitate the process of qualification by the Board Authority, the Board Authority will combine the process of certifying and designating as Qualified West Virginia Capital Companies under the Act into a one step procedure.

2.2 Requirements for Qualified Company. The following requirements shall apply to all Qualified Companies and Applicants:

2.2.1 A Qualified Company shall either be (A) a West Virginia business development corporation or (B) a profit or nonprofit entity organized and existing under the laws of West Virginia, created for the purpose of making ~~venture or risk~~ capital available for qualified investments.

2.2.2 A Qualified Company shall have a reasonably accessible business office located within the State of West Virginia, which office shall have a listed telephone number and shall be open to the public during normal business hours.

2.2.3 A Qualified Company shall maintain all of its capital base, as defined in these Rules, except that which has been invested to meet the purposes of the Act, in bank accounts and financial institutions, which are located in the State of West Virginia, or in such other cash-equivalents interest bearing instruments with a maturity of less than one year which are obtained from and managed by a West Virginia corporation. For purposes of these Rules, the phrase "interest bearing instruments with a maturity of less than one 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 year or less obtained from a West Virginia branch office of a brokerage firm.

2.2.4 A Qualified Company shall have a capital base of at least One Million Dollars but not greater than Four Million Dollars during any fiscal year, which capital base must be raised after July 1, 1986. If the amount of the investment in a 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 uncollectibility and write-off of a qualified investment shall not be in violation of the One Million

Dollar minimum requirement set forth in this Subsection and in Code §5E-1-7(d).

~~2.2.5 No part of the capital base of a Qualified Company may be debt, provided that this requirement shall not apply to any application submitted for qualification on or before February 28, 1990.~~ No more than twenty-five (25%) percent of each separate capital base of a Qualified Company shall be in the form of full recourse, interest bearing demand notes, backed by an irrevocable letter of credit or bond from a reputable source, as determined by the Authority.

2.2.6 A Qualified Company's stated purpose must be to encourage and assist in the creation, development or expansion of West Virginia businesses.

2.2.7 An Applicant shall establish an escrow account located in West Virginia, in which account, funds invested in the Applicant shall be deposited and held for the period of time between their receipt by the Applicant and the designation of the Applicant as a Qualified Company. A Qualified Company, seeking to establish a separate capital base or increase its capital base, shall establish an escrow account located in West Virginia, into which account funds invested in the Qualified Company shall be deposited and held for the period of time between their receipt by the Qualified Company and the designation as qualified of a

separate capital base or an increase to capital base. Such funds shall not be invested by the Applicant or the Qualified Company until such designation by the Board Authority. In the event the Board Authority does not designate the Applicant a Qualified Company, or designate as qualified, a separate capital base or an increase to capital base, such funds shall be returned to the investors, if requested by the investors.

2.2.8 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 Board 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.

2.2.9 A Qualified Company must hold a valid West Virginia business registration certificate pursuant to article twelve, chapter eleven of the Code, or be exempt from such registration.

2.3 Designation Requirements. An Applicant shall make written application for designation as a Qualified West Virginia Capital Company to the Board 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

or trustee of the Applicant and contain the following information and evidence:

2.3.1 The full legal name of the Applicant;

2.3.2 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;

2.3.3 Information and ~~evidence~~ that the Applicant's purpose is to encourage and assist in the creation, development and expansion of West Virginia businesses and ~~to provide maximum opportunities for the employment of West Virginians by making venture capital available to West Virginia businesses;~~

2.3.4 A certified copy of the Certificate of Incorporation, Articles of Incorporation, Corporate Charter, a certified copy of the certificate of formation of limited or general partnership; 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;

2.3.5 The titles, names, addresses and telephone numbers of the Applicant and the Applicant's directors and officers; or general, limited and managing partners; or trustees; which

addresses shall include street and number, city or town, state and zip code;

2.3.6 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, or individual joint investors, the foregoing information for all partners, shareholders and individuals;

2.3.7 Information ~~and evidence~~ 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 Beard 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 Beard Authority for each fiscal year;

2.3.8 Information ~~and evidence~~ 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, these Rules, or the application thereof;

2.3.9 A statement that the Applicant will use its capital base, as defined in these Rules, to make qualified investments in accordance with the schedule set forth in Code § 5E-1-12 and Subsection 5.3 of these Rules;

2.3.10 A statement that the Applicant will comply with all requirements of the Act and these Rules;

2.3.11 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;

2.3.12 Information stating the total capital base of the Applicant, ~~and how the value has been determined and how the equity portion has been determined;~~

2.3.13 Information ~~and evidence~~ regarding whether the Applicant has been decertified under Section 6 of these Rules and whether any of the Applicant's officers, general partners, managing partners, trustees or investors have ever served as officers, general partners, managing partners or trustees of any decertified Qualified Company;

2.3.14 Information ~~and evidence~~ 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 Board 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;

2.3.15 If any of the investors in the Applicant is a partnership, an S Corporation, or an individual joint investor, the apportionment plan, the employer identification or social security number of those to whom the tax credits ~~is~~ are apportioned, and statements signed by each partner, shareholder, or individual ~~consents~~ ~~consenting~~ to the apportionment plan; all of which requirements are more fully set out in Subsection 4.7.6+2 of these Rules;

2.3.16 The information required in Subsection 4.1 of these Rules;

2.3.17 Information that the Applicant holds a valid West Virginia business registration certificate pursuant to article twelve, chapter eleven of the Code, or is exempt from such registration.

2.3.1718 Such additional information as may be requested by the Board Authority.

2.4 Application Form. The form for applying to become a Qualified West Virginia Capital Company may be obtained from the Director.

2.5 Filing. Each Applicant shall file three (3) complete applications with the Director.

2.6 Procedure for Review by Director. The Director shall record the time and date of filing of the application at the time the application is received in the Office of the West Virginia Economic Development Authority. The Director shall review all applications in the order they are received. Upon receipt of an application, the Director shall review the application to determine if the application is complete. Such determination shall be made within 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 at any time after correcting the deficiencies stated in the Notice. If the initial filing was substantially complete, the time of filing for the resubmitted application, for purposes of review by the Director, shall be the time of the initial filing. If the initial

filing was not substantially complete, the time of filing shall be the date and time when the resubmitted application is received by the Director.

2.7 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.

2.8 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 ~~Board~~ meeting of the Authority.

2.9 Action of Board Authority. The ~~Board Authority~~ shall consider all applications in the order they are placed on the agenda of any regularly scheduled meeting of the ~~Board Authority~~. The ~~Board Authority~~ shall designate as a Qualified Company those Applicants which meet the requirements of the Act and these Rules.

2.10 Allocation of Tax Credits. Upon designating a Qualified West Virginia Capital Company, the ~~Board Authority~~ shall allocate, in the order in which companies are qualified by the ~~Board Authority~~, available tax credits for the investors in the Qualified Company.

2.11 Notification of Qualification. The Director shall notify the Applicant in writing of the ~~Board's~~ Authority's action designating the Applicant a Qualified West Virginia Capital Company and shall issue to the Qualified Company the Certificate of tax credit provided in Subsection 4.5 of these Rules. Such notice shall set forth the level of equity capitalization that qualifies for tax credits under Code § 5E-1-8.

2.12 Suspension of Qualification Process. The ~~Board~~ Authority shall suspend the qualification process during any fiscal year in which all available tax credits for such fiscal year have been allocated.

2.13 Additional Applications. A Qualified Company which does not seek additional tax credits under Section 3 of these Rules is not required to file any additional application with the ~~Board~~ Authority to retain its status as a Qualified Company, provided that the Qualified Company remains in compliance with the requirements of the Act and these Rules.

2.14 Amendments. A Qualified Company must notify the Director of any changes in any of the information filed with the ~~Board~~ Authority as part of its application filed under Sections 2 and 3 of these Rules or any other information submitted to the ~~Board~~ Authority pursuant to these Rules. Such notification must be in writing and filed by the Qualified Company with the Company's

next semi-annual report which it is required to file pursuant to Subsection 4.1 of these Rules.

Section 3. Additional Tax Credits.

~~3.1. Separate Capital Base. During each fiscal year, a Qualified Company may seek a new capital base and increases to its capital base as follows:~~ 3.1.1 During Each fiscal year, a Qualified Company may apply to the Board Authority for designation as qualified of a separate capital base. Such application for separate capital base must be in the amount of at least One Million Dollars but may not exceed Four Million Dollars. The Qualified Company shall file an application on the form provided in Section 2 of these Rules and shall provide the information required for applicants in Subsections 2.3.6, 2.3.7, 2.3.8, 2.3.9, 2.3.11, 2.3.12, 2.3.13, 2.3.14, 2.3.15 and 2.3.16 of these Rules, as they apply to the Qualified Company's separate capital base and shall also amend its original application to reflect any changes in the information that it initially filed with the Board Authority. The procedures set forth in Section 2 of these Rules shall apply to the review of the application by the Director and the Board Authority. Each approval of an application under Subsection 3.1 of these Rules will create a separate capital base for the Qualified Company. Each separate capital base shall be subject to all investment and reporting requirements of Section 5 and 6 of these Rules.

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 3.1 of these Rules, 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 these Rules, including the 35-55-75 investment schedule of §5E-1-12(a) of the Act and Subsection 5.3 of these Rules.

~~3.1.2~~ 3.2 Increases to Capital Base. During any fiscal year in which it has not received approval for the maximum tax credit of Two Million Dollars for that year, a Qualified Company may apply for an increase in its capital base and additional credits in accordance with Subsection 4.3 of these Rules. The Qualified Company shall file an application on the form provided in Section 2 of these Rules and shall provide the information required for applicants in Subsections 2.3.6, 2.3.7, 2.3.8, 2.3.9, 2.3.11, 2.3.12, 2.3.13, 2.3.14, 2.3.15 and 2.3.16 of these Rules, as they apply to the increase of the Qualified Company's capital base, and shall amend its original application to reflect any changes in the information that it initially filed with the Board Authority. The procedures set forth in Section 2 of these Rules shall apply to the

review of the application by the Director and the Board Authority. Each approval under 3.2 of these Rules will be treated as an increase to capital base for the fiscal year in which application for such increase was made. All such increases and the initial capital base shall constitute a single, separate 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 3.2 and 4.3 of these Rules and such increase of \$500,000.00 is approved by the Authority on October 1, 1991. With such 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 §5E-1-12(a) of the Act and Subsection 5.3 of these Rules. The \$500,000.00 increase occurs in Year 2 of the original 20-40-60 investment schedule. Therefore, as illustrated below, by the end of Year 2, Qualified Company must have invested in a qualified manner a total of \$675,000.00 (40% of the original \$1.0 million plus 55% of the \$500,000.00 increase). By the end of Year 3, a total of \$975,000.00 (60% of the original \$1.0 million plus 75% of the \$500,000.00 increase) in qualified investments is required.

	Year 1 2/1/89 - 2/1/90	Year 2 2/1/90 - 2/1/91	Year 3 2/1/91 - 2/1/92
Cumulative Required Investment	\$200,000.00 (20% of \$1.0 million)	\$400,000.00 (40% of \$1.0 million)	\$600,000.00 (60% of \$1.0 million)
		+	+
		\$275,000.00 (55% of \$500,000.00)	\$375,000.00 (75% of \$500,000.00)
Total	\$200,000.00	\$675,000.00	\$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 §5E-1-12(a) of the Act and Subsection 5.3 of these Rules. Because the 20-40-60 investment schedule pertaining to the original \$1,000,000.00 expired on 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 3.1 of these Rules.

~~3.2 Separate Capital Bases. Each approval of an application under Subsection 3.1.1 of these Rules will create a separate capital base for the Qualified Company. Each separate capital base shall be subject to all investment and reporting requirements of Section 5 and 6 of these Rules. Each approval under 3.1.2 of these Rules will be treated as an increase to capital base for the fiscal year in which application for such increase was made. All such increases approved within a single fiscal year shall be added to the capital base initially approved by the Board in such year. All such increases and the initial capital base shall constitute a single, separate capital base. All such increases to capital base shall be deemed to have been designated as qualified for purposes of Subsection 5.2 of these Rules, as of the date on which the capital base initially approved by the Board in such year was designated as qualified.~~

Section 4. Tax Credits.

4.1 Semi-Annual Reports. Each Qualified Company shall report to the Tax Commissioner and the Board Authority on a semi-annual basis, and shall file separate reports for each separate capital base that is designated as qualified by the Board Authority. Such reports shall be made at the end of the second and fourth quarters of the Qualified Company's fiscal year, covering the preceding two quarters provided that the first report required under this Subsection shall be made no earlier than six months

after the Company's designation as a Qualified Company, or the designation as qualified of a separate capital base, and shall continue ~~for five years from such designation until such Qualified Company is decertified by the Authority.~~ Such reports shall be submitted to the ~~Board~~ Authority no later than thirty days from the end of the second and fourth quarters of the Qualified Company's fiscal year. The initial report shall contain the following information:

4.1.1 The name of each investor in the Qualified Company who has ~~applied for~~ received a tax credit;

4.1.2 The amount of each investor's investment and the ~~date on which the investment was made;~~

4.1.3 The amount of tax credit allowed to the investor ~~and the date on which the investment was made;~~

4.1.4 All Qualified Investments the Company has made;

4.1.5 Such additional information as may be requested by the ~~Board~~ Authority; and

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

4.2 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.

4.3 Additional Tax Credits. A ~~If a~~ Qualified Company which has not received approval for the maximum tax credit of Two Million Dollars within any a State fiscal year, such Qualified Company may apply, ~~under Section 3 pursuant to Subsection 3.2 of these Rules, as many as three additional times during such State fiscal year for additional credits of at least \$50,000.00 each, subject to the limitations set forth in Subsection 4.2 of these Rules.~~

4.4 Total Credits; Allocation. The total credits authorized by the ~~Board Authority~~ for all Qualified Companies may not exceed a total of Ten Million Dollars each fiscal year. The ~~Board Authority~~ shall allocate these credits to Qualified Companies in the order that companies are designated as Qualified West Virginia Capital Companies.

4.5 Certificate of Tax Credit. The ~~Board Authority~~ shall issue to the Qualified Company a Certificate approving the amount of tax credits allocated to the Qualified Company in the order in which the companies were designated qualified by the ~~Board Authority~~ or in which separate capital bases or increases in capital were designated as qualified by the ~~Board Authority~~, which

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, a Certificate on a form prepared by the Board Authority, signed and verified by the Qualified Company or by a duly authorized officer, partner or trustee of the Qualified Company, which Certificate shall set forth the amount of the investor's credit. The investor shall submit a true copy of the 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 or an individual joint investor, the tax credit shall be apportioned among the partners, the shareholders of the corporation, or the individual investors pursuant to the provisions of Subsection 4.7.6 of these Rules.

4.6 Investors Entitled to Tax Credit. Any investor, including an individual, partnership or corporation, who makes a ~~capital~~ ~~an~~ investment in a Certified Company that becomes a Qualified Company pursuant to these Rules, is entitled to tax credit as allocated under Subsection 2.10 of these Rules. The partners of a partnership, the shareholders of an S corporation, and individual joint investors shall be entitled to the credits allocated and authorized by the Board Authority for investments by the partnership, the S corporation or the joint investors in accordance with the apportionment plan provided for in Subsection 4.7.6 of these Rules.

4.7 Application of Tax Credits

4.7.1 General rule. The amount of tax credit allowed for the taxable year is the portion of the tax credit authorized under Code § 5E-1-8(c) and Subsection 4.6 of these Rules that does not exceed the tax liability limitation as hereinafter provided.

4.7.2 Tax credit available. The credit available for the taxable year is the sum of:

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

4.7.2.2 Amount of tax credit determined under Code § 5E-1-8(c) for the taxable year and described in Subsection 4.6 of these Rules herein (tax credit earned); and

~~4.7.2.3 Unused tax credit carried back from succeeding taxable years (carrybacks).~~

4.7.3 Tax liability limitation

~~4.7.3.29~~ 4.7.3.1 Tax credit available for a taxable year beginning after June 30, 1986, must be applied against the same taxes and in the same order as set forth in subsections (c) through

(i), section five, article thirteen-c, chapter eleven of ~~this code~~
the Code.

~~4.7.3.1 Tax credit available for a taxable year beginning before July 1, 1986 must be applied first against tax liability imposed pursuant to Article 13, Chapter 11 of the Code for periods prior to July 1, 1986; and then against tax liability imposed pursuant to Articles 21 or 24 of said Chapter 11, after such tax liability is amended to reflect the reduction of business and occupation tax credit resulting from the application of the tax credit.~~

4.7.4 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 back or~~ carried forward as hereinafter provided under Subsection 4.8 of these Rules.

4.7.5 Order of application. If the tax credit available for a taxable year is not allowed in full because of the tax liability limitation, carryforwards are applied against the tax liability limitation first. To the extent the tax liability limitation exceeds carryforwards, tax credit earned for the taxable year ~~and carrybacks from subsequent taxable years are~~ is then applied.

~~EXAMPLE.~~

~~A. Because of qualified investments made by Corporation M in Qualified Companies in 1986, 1987 and 1988, the Corporation's tax credit available for its taxable year ending December 31, 1987, is as follows:~~

Tax credit carryforwards from 1986 investment	\$ 5,000
Tax credit earned from 1987 investment	10,000
Tax credit carryback from 1988 investment	15,000
Total tax credits available	\$30,000

~~B. M's "tax liability limitation" as defined in Subsection 4.7.3.2 of these Rules for 1987 is \$25,000.~~

~~C. The tax credit carryforward and tax credit earned are allowed in full. However, only \$10,000 of the tax credit carryback is allowed for 1987. The remaining \$5,000 must be carried to the next year to which it may be carried under Subsection 4.8 of these Rules.~~

4.7.6 Apportionment

4.7.6.1 The tax credits authorized by the Board Authority for investments by a partnership, an S corporation, or individual

joint investors shall be divided pursuant to election of partners, shareholders, or individuals as hereinafter provided.

4.7.6.2 The tax credit earned shall be apportioned among partners, S corporation shareholders, or individual joint investors in any manner they may select, provided that each such partner, shareholder or individual consents to an apportionment plan. The consent of a partner, shareholder or individual to an apportionment plan with respect to tax credits earned shall be made by means of a written statement signed by the partner, shareholder, or individual, or a person duly authorized to act on behalf of the consenting partner, shareholder, or individual, stating that such partner, shareholder, or individual consents to the apportionment plan. The statement 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 or individual and the amount apportioned to each partner, shareholder or individual under the plan. The consent of more than one partner, shareholder or individual may be incorporated in a single statement. The statement shall be filed with the application required pursuant to Subsection 2.3 of these Rules and shall be irrevocable and not subject to change after such filing unless the tax credit authorized by the Board Authority is less than the tax credit applied for, in which case the Board Authority may request the apportionment plan to be amended. Each partner, shareholder 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.

4.7.6.3 An apportionment plan adopted and consented to by all partners, S corporation shareholders or joint individual investors shall be valid only for the tax credits authorized by the Board 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 2.3 of these Rules.

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

4.8 ~~Carry Back and Carry Forward~~ Carryforward of Unused Tax Credit

4.8.1 In general. Unused tax credit may be ~~carried back~~ and carried forward to succeeding taxable years but not beyond fifteen years. ~~Carrybacks and e~~Carryforwards 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.

4.8.2 Unused credit. If carryforwards and tax credit earned exceed the applicable 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".

~~4.8.3 Taxable years to which unused tax credit may be carried. An unused tax credit is a carryback to each of the 3 taxable years preceding the unused credit year and a carryforward to each of the 15 taxable years following the unused tax credit year. An unused tax credit must be carried first to the earliest of the 18 taxable years to which such credit may be carried. An unused tax credit then must be carried to each of the other 17 taxable years (in order of time) to the extent that the unused tax credit was not absorbed during the prior taxable year because of the applicable tax liability limitation.~~

~~4.8.4 Limitations on carrybacks. Tax credit carryforwards and tax credit earned are applied against the tax liability limitation before tax credit carrybacks. Thus, tax credit carrybacks to a taxable year may not exceed the amount by which the applicable tax liability limitation for that year exceeds the sum of tax credit carryforwards to and tax credit earned for that year. Tax credit carrybacks from an unused tax credit year are applied against the tax liability limitation before carrybacks from a later unused tax credit year. To the extent an unused tax~~

~~credit cannot be carried back to a particular preceding taxable year, the unused tax credit must be carried to the next succeeding taxable year to which it may be carried.~~

~~4.8.5 Certain tax credit carrybacks. In the case of an overpayment of tax, additions to tax, penalties or interest attributable to the application to the taxpayer of a tax credit carryback (including that attributable to a mathematical or clerical error in application of the tax credit carryback), a claim for refund of such overpayment of tax, additions to tax, penalties or interest may be filed at any time before the expiration of the period within which a deficiency for the taxable year of the unused credit which results in such tax credit carryback may be assessed pursuant to Code § 11-10-15.~~

4.8.63 Limitations on Carryforwards. Tax credit carryforwards to a taxable year may not exceed the applicable tax liability limitation for that year. Tax credit carryforwards from an unused tax credit year are applied before tax credit carryforwards from a later unused tax credit year.

4.8.74 Joint Return by Husband and Wife. This Subsection prescribes additional rules for computing the tax credit ~~carrybacks~~ and carryforwards 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.

4.8.74.1 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 Subsection 4.7.6 of these Rules shall together be deemed a joint tax credit carryforward ~~or joint tax credit carryback~~ to such taxable year.

4.8.74.2 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 ~~or tax credit carryback~~ to such taxable years, the joint tax credit, ~~or tax credit carryforward or tax credit carryback~~ to such taxable year is computed in the same manner as the tax credit carryforward ~~or tax credit carryback~~ of an individual as provided in Subsections 4.8.1 through 4.8.63 of these Rules.

4.8.74.3 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 or tax credit carryback~~ to such taxable year, the separate tax credit carryforward ~~or separate tax credit carryback~~ of each spouse to the taxable year is computed in accordance with Subsections 4.8.1 through 4.8.63 of these Rules 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 Subsection 4.7.6 of these Rules.

4.8.74.4 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 ~~or tax credit carryback~~ to such taxable years, such tax credit carryforward ~~or tax credit carryback~~ to the taxable year is computed in the manner set forth in Subsection 4.8.74.3 of these Rules. Such tax credit carryforward ~~or tax credit carryback~~ is considered a joint tax credit carryforward ~~or joint tax credit carryback~~ to such taxable year.

4.8.74.5 Joint Tax Credit Carryforwards and Carrybacks. The joint tax credit carryforwards ~~and joint tax credit carrybacks~~ to any taxable year for which a joint return is made are all the tax credit carryforwards ~~and tax credit carrybacks~~ of both spouses to such taxable year.

4.8.4.76 Divorce and Remarriage. It is the intent of this rule to allow the carryforward ~~and carryback~~ 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. ~~A former spouse shall not be permitted to obtain a tax refund by carrying back the other's separate tax credit earned after the divorce to a taxable year in which a joint return was filed.~~ 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 ~~carrybacks and carryovers~~ and investment tax credit ~~carrybacks and carryforwards~~ may be used as a guide.

4.8.85 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 Board Authority for investments by a partnership, an S corporation or individual joint investors may be apportioned pursuant to Subsection 4.7.6 of these Rules.

4.9 Investment to Date. The tax credit provided for in 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.

4.10. Recapture. If the amount invested by the investor is not used by the Qualified Company for qualified investments as required by the Act and Section 4 of these Rules, 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 Code §5E-1-12 and Subsection 6.6 of these Rules.

Section 5. Investment Reporting, Record Keeping, Restrictions and Sale or Liquidation.

5.1. Investments. A Qualified Company shall invest at least ~~sixty percent (60%)~~ of each separate capital base in Qualified Investments in accordance with the schedule set forth in Subsection 5.3 of these Rules. ~~A qualified company may invest the remaining forty percent (40%) of each separate capital base in any West Virginia business except those businesses prohibited by Subsection 5.5 of these Rules. The Qualified Company shall invest at least sixty percent (60%) of each capital base in equity or unsecured debt investments, provided that this requirement shall not apply to any application submitted for qualification on or before January 31, 1990. Such equity or unsecured debt investments must be made within five years from the date on which the capital base was qualified by the Board. The investment of a Qualified Company's capital base in cash equivalents or with financial institutions shall not be deemed an investment for purposes of this~~

Section. The portion of each separate capital base of a Qualified Company not so invested 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 year which are obtained from and managed by a West Virginia corporation, as defined in Subsection 2.2.3 of these Rules. After an investment is made, the Qualified Company must obtain and submit to the Board Authority with the next semi-annual report of said Company, required to be filed pursuant to Subsection 4.1 of these Rules, affidavits prepared by any officer or partner of the business invested in, which affidavits set forth the following:

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

5.1.2 That more than fifty percent (50%) of its assets, and operations, as defined in Subsection 1.7.1.25 of these Rules, and employees are located in West Virginia;

5.1.3 That more than fifty percent (50%) of its employees are West Virginia residents.

5.1.24 A brief description of the activities the business is engaged in.

5.2 Affidavit from Qualified Company. The Qualified Company shall submit to the Board Authority, contemporaneous with the filings required under Subsection 5.1 of these Rules herein, affidavits prepared by an officer, partner or trustee of the Qualified Company which demonstrate:

5.2.1 That the business invested in is not a business engaged in an activity prohibited by Subsection 5.5 of these Rules;

5.2.2 That the business invested in is a West Virginia Business as defined in Subsection 1.7.1.25 of these Rules; and

5.2.3 If a Qualified Investment, that the West Virginia Business invested in is engaged in activities that meet the requirements of a Qualified Investment, as specified in Subsection 1.7.1.20 of these Rules.

5.3 Schedule of Qualified Investments. A Qualified West Virginia Capital Company must invest each separate capital base in Qualified Investments according to the following schedule:

5.3.1 At least ~~twenty~~ thirty-five percent (~~20~~35%) of its capital base within one year of the date on which the Qualified

Company was designated as a Qualified West Virginia Capital Company by the Board Authority or on which each separate capital base was designated as qualified by the Board Authority;

5.3.2 At least ~~forty~~ fifty-five percent (~~40~~55%) of its capital base within two years of the date on which the Qualified Company was designated as a Qualified West Virginia Capital Company by the Board Authority or on which each separate capital base was designated as qualified by the Board Authority;

5.3.3 At least ~~sixty~~ seventy-five percent (~~60~~75%) of its capital base within three years of the date on which the Qualified Company was designated as a Qualified West Virginia Capital Company by the Board Authority or on which each separate capital base was designated as qualified by the Board Authority.

5.4 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 Board Authority.

5.5 Investment Restrictions.

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

~~5.5.1 Banks, Savings & Loan Associations, Credit Companies, Financial or Investment Advisers, and Brokerage or Financial Firms;~~

~~5.5.1.1 Banks;~~

~~5.5.1.2 Savings & Loan Associations;~~

~~5.5.1.3 Credit Companies;~~

~~5.5.1.4 Financial or Investment Advisers;~~

~~5.5.1.5 Brokerage or Financial Firms;~~

~~5.5.2 5.5.1.6 Other Capital Companies;~~

~~5.5.3 5.5.1.7 Charitable and religious institutions;~~

~~5.5.4 5.5.1.8 Conventional oil and gas exploration;~~

~~5.5.5 5.5.1.9 Insurance Companies;~~

~~5.5.6 5.5.1.10 Residential Housing or Development; and~~

~~5.5.7~~ ~~5.5.1.11~~ Any other business which the Board Authority determines to be against the public interest, the purposes of the Act or in violation of any law.

~~5.5.2~~ "Residential housing or development" shall not include, and "tourism," as referred to in Subsection 1.7.1.20 of these Rules, 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 Subsection shall obtain certification from the Authority that such investment is eligible for qualification as a "tourism" investment.

~~5.6 Relationships.~~ A Qualified Company shall not invest its capital base in a business that is related to that Qualified Company or in a business that is owned or operated by or employs, any person, or family of such person, who is an officer, investor, employee or a member of the board of directors of that Qualified Company, unless the Board approves the making of the investment in writing. All relationships will be determined in accordance with the owner attribution rules set forth in Section 267 of the Internal Revenue code of 1954, as amended.

5.6. Alter Ego Investments Prohibited.

5.6.1 Substantially Related. Code §5E-1-13(b)(1) prohibits a Qualified Company from making investments of any portion of its capital base in a business which is "substantially related" to the Qualified Company. "Substantially related" shall mean that one or more of the following conditions are present at the time the investment is made or while the investment is outstanding:

5.6.1.1 Any investor in the Qualified Company is also an investor or owner of the West Virginia Business. Ownership shall include direct or indirect ownership. "Indirect" ownership includes ownership by a spouse, child, blood relative, stepchild, stepparent, stepbrother or stepsister of the investor in the Qualified Company;

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 Subsection 5.6.1.1 of these Rules, the West Virginia Business would not be "substantially related" to Qualified Company as long as: (i) neither A, B nor C is an investor or owner of the West Virginia Business, and; (ii) no spouse, child, blood relative, stepchild, stepparent, stepbrother,

or stepsister of either A, B or C is an investor or owner of the West Virginia Business.

5.6.1.2 There is an agreement, written or oral, between the Qualified Company and the West Virginia Business that the investment by the Qualified Company in the West Virginia Business is conditioned upon the West Virginia Business entering into any contract, agreement or other arrangement with an investor in the Qualified Company or any business owned or controlled by an investor in the Qualified Company;

EXAMPLE.

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.

5.6.1.3 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;

5.6.1.4 The investment by the Qualified Company results in there being either (i) no equity ownership in the West Virginia

Business other than the Qualified Company or (ii) the non-Qualified Company ownership in the West Virginia 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" pursuant to Subsection 5.6.1.4 of these Rules. Therefore, XYZ would be "substantially related" to 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 such 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 has been appraised at \$15,000.00. The non-Qualified Company ownership by K does not lack economic

substance pursuant to Subsection 5.6.1.4 of these Rules and XYZ would not be "substantially related" to Qualified Company.

EXAMPLE 3.

Qualified Company owns ninety shares (equalling 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 such 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" pursuant to Subsection 5.6.1.4 of these Rules 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.

5.6.2 Control of Board of Directors. Code §5E-1-13(b) (2) prohibits a Qualified Company from controlling the board of directors of the West Virginia Business unless control consist of no more than a simple majority of the board. In order to determine control, directors representing the Qualified Company will include directors of the West Virginia Business that are (i) employees, officers, directors or other management personnel of the Qualified Company; (ii) persons who are investors in the Qualified Company or

(iii) persons who are related by blood or marriage to or are the stepchild, stepparent, stepbrother or stepsister of an investor in the Qualified Company or an employee, officer, director or management official of the Qualified Company. Non-Qualified Company directors shall include individuals who do not meet the preceding conditions and who also are not related by blood or marriage to or are the stepchild, stepparent, stepbrother or stepsister of any investor, employee, officer, director or management official of the Qualified Company. If the West Virginia Business is not a corporation then the same rules concerning control shall apply to the managing body for the West Virginia Business which would be voting partners in the case of a general partnership, general partners in the case of a limited partnership and the management committee or similar decision making body in the case of a joint venture.

5.6.3 For purposes of Subsection 5.6 of these Rules, "blood relative" or "related by blood" shall include children, grandchildren, parents, grandparents, brothers and sisters, nephews and nieces, uncles, aunts, and first cousins.

5.7 Management Interlock.

5.7.1 Except when required in order to remedy problems arising from a lack of profitability in the West Virginia Business or from dishonesty of the persons managing the West Virginia

Business or from the death or unanticipated departure of a person occupying a key management position in the West Virginia Business, a Qualified Company is prohibited from managing the West Virginia Business. Therefore, unless otherwise provided, no investor, director, officer or employee of the Qualified Company can occupy a management position in the West Virginia Business. A "management position" shall mean any office or position other than that of member of the board of directors. Management shall include any position 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 West Virginia Business. In the case of a general partnership, a general partner shall not be deemed to occupy a management position in the West Virginia Business merely because such general partner regularly exercises his voting rights as long as such general partner is not responsible for and does not have authority over all or any portion of the day-to-day operations of the West Virginia Business.

5.7.2 In order to establish that occupation of management positions is required in order to cure a lack of profitability in the West Virginia Business, the Qualified Company must be able to demonstrate that the expenses of the West Virginia Business have exceeded the revenues of the business for two consecutive fiscal quarters. If the Qualified Company takes control of management of the West Virginia Business, such control shall be relinquished within a reasonable time after the revenues of the West Virginia

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 West Virginia Business for a period exceeding twenty-four months, even if profitability is not restored at the end of such twenty-four month period.

5.7.3 In order to establish the existence of the 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 criminal law in connection with the performance of their duties for the West Virginia 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."

5.7.4 In situations involving the death or unanticipated departure of a person occupying a key management position in the West Virginia 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 months.

5.8 Conflict of Interest. No officer, member, or employee of the Authority shall be financially interested, directly or indirectly, in any capital company.

5.9 Limitation on Financial Institutions.

5.9.1 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 this Subsection, "total capital base" shall mean the sum of all separate capital bases and additions to capital bases of a Qualified Company.

5.9.2 The following shall be an "affiliate" of a bank, savings and loan association, savings bank, or other financial institution for purposes of this Section 5.9 of the Rules and Code §5E-1-20:

5.9.2.1 A holding company of such financial institution;

5.9.2.2 A wholly owned subsidiary of such financial institution;

5.9.2.3 A corporation, partnership or other entity of which such financial institution has majority ownership;

5.9.2.4 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.

5.9.3 No officer, employee, or director of any such financial institution may serve on the board of any Qualified Company formed under the Act. Such restriction shall apply to affiliates of such financial institutions. If the Qualified Company is not a corporation, then the restriction shall also apply to the managing body of the Qualified Company which would be voting partners in the case of a general partnership, general partners in the case of a limited partnership, and the management committee or similar decision-making body in the case of a joint venture.

5.810 Sale or Liquidation of Qualified Investments

5.810.1 ~~If a Qualified Company sells or liquidates any qualified investment within five years of making the qualified investment, the company's initial cost basis in the investment shall be reinvested in a qualified investment within twenty-four months from the date of the sale or liquidation, unless a waiver is obtained from the Board prior to the end of said twenty-four month period. The Board may waive the reinvestment requirement in those circumstances in which the Board deems the waiver of the reinvestment requirement advisable, necessary or appropriate to promote the purposes of the Act. The Qualified Company may disburse, reinvest, or otherwise use any proceeds in excess of the company's initial cost basis without any restrictions on such use by the Board.~~ A qualified West Virginia Qualified Company shall maintain its qualified investments for a period of at least five

years, except that a qualified West Virginia Qualified Company receiving repayment or return of a qualified investment (exclusive of interest, dividends or other earnings on such 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, such reinvestment to be made within twenty-four months from the date of repayment or return, unless a waiver is obtained from the Authority prior to the end of said twenty-four month period: provided, that such returned amounts may be accumulated for six months before the aforesaid twenty-four month period commences.

5.10.1.1 For purposes of Subsection 5.10.1 and Code §5E-1-12(b), a debt investment, as defined at Subsection 1.7.1.10 of these Rules, shall be considered to be "maintained" for the required five year period when (i) such debt investment becomes uncollectible and is written-off by the Qualified Company or (ii) such debt investment is not repaid in full for at least five 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 has not maintained a debt investment for the required five-year period because it has received installment payments, not determined by a normal amortization schedule, which exceed thirty percent (30%) of the original principal balance during any one year of the required five-year period, the Qualified Company shall reinvest all repaid principal pursuant to Subsection 5.10.1 of these Rules and Code Section 5E-1-12(b) while the remaining principal would remain qualified as long as it continues to be invested in compliance with these Rules and the Act. For purposes of this Subsection, "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 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 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 Subsection 5.10.1.1 as long as such 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 Subsection 5.10.1 and Code §5E-1-12(b). The remaining \$59,000.00 in principal owed would remain a qualified investment as long as the provisions of these Rules 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 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 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 Subsection 5.10.1.1. 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 years and, therefore, must be reinvested pursuant to Subsection 5.10.1 and 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 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 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.

5.10.1.2 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 debtor in advance of the required five-year period, repayment in advance of the required five-year period due to default by the debtor and acceleration of the loan, or otherwise, must reinvest its repaid or returned principal as is required by Code §5E-1-12(b) and Subsection 5.10.1 of these Rules.

5.10.1.3 A Qualified Company desiring a waiver from the Authority of its obligation to reinvest its repaid or returned principal in a qualified investment which has not been maintained for the required five-year period pursuant to Code §5E-1-12(b) and Subsection 5.10.1 of these Rules shall request such waiver in writing and send such written request by certified mail to the Authority at the following address:

West Virginia Economic Development Authority
Capitol Complex
Building 6, Room 525
Charleston, West Virginia 25305

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.

5.810.2 A Qualified Company may sell or liquidate a qualified investment which has been maintained for the required five-year period ~~five years after making such investment, without any restriction on the use of such funds.~~; however, the initial cost basis of such qualified investment shall be maintained or invested by the Qualified Company in one or more of the following:

5.10.2.1 In Qualified Investments;

5.10.2.2 In bank accounts and financial institutions which are located in the State of West Virginia; and

5.10.2.3 Such other interest bearing instruments with a maturity of less than one year which are obtained from and managed by a West Virginia corporation, as defined in Subsection 2.2.3 of these Rules.

5.711 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 5 of these Rules.

Section 6. Audits, Reports, Confidentiality, Examination,
Failure to Comply, Penalties, Decertification

6.1 Annual Audit and Report. An audit shall be conducted annually for each Qualified Company by a certified public accountant, beginning at the end of the fiscal year of the Company, and continuing ~~for a period of five years from the date of the Company's designation as a Qualified Company until such Qualified Company is decertified by the Authority.~~ In addition, an audit shall be conducted for each capital base of the Qualified Company designated as qualified. Such audits shall ~~be conducted for five years from the date of each designation also continue until such Qualified Company is decertified by the Authority,~~ and may be consolidated and submitted with all other audits required under this Subsection, so long as the requirements under the Act and these Rules with respect to each capital base are separate and distinct.

6.2 General Requirements for Audits: The following requirements shall apply to Audits of the Qualified Company:

6.2.1 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.

6.2.2 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 Beard Authority before the end of the three (3) year period. The working papers shall be made available upon written request of the Beard Authority or the Director. The audit shall be conducted in accordance with generally accepted auditing and accounting principles and such other guidelines as the Beard Authority may prescribe.

6.2.3 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 these Rules and in particular whether the company has made proper and timely investments. Any instances of noncompliance must be specifically cited, and if the accountant finds that the Company has been in compliance, the accountant must make a positive statement to that effect.

6.2.4 Three certified copies of the audit report shall be submitted to the Beard Authority no later than ninety days from the end of each fiscal year, together with three copies of a descriptive narrative of the Qualified Company's activities, its

financial statement, its methods of operation and the general conduct of the Company.

6.2.5 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.

6.2.6 Such other requirements as the Board Authority may require.

6.3 Confidentiality. ~~All records, documents, and all other information and materials submitted to the Board by a Qualified Company shall be privileged and exempt from disclosure.~~

6.3.1 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 this Section of the Rules and in §§5E-1-8 and 5E-1-21 of the Act.

6.3.2 All information submitted to the Authority pursuant to (i) the application for designation as a Qualified Company and other related documents, (ii) application for designation as qualified of a separate capital base pursuant to Subsection 3.1 of these Rules, and (iii) application for an increase to capital base pursuant to Subsection 3.2 of these Rules, shall be considered

confidential and not subject to public disclosure when filed with the Authority, except the following:

6.3.2.1 The full legal name of the entity making any such application;

6.3.2.2 The mailing and office addresses and telephone number of such applicant;

6.3.2.3 The name of a person to contact for such applicant;

6.3.2.4 The names of all directors, officers or managing partners of such applicant;

6.3.2.5 Whether such applicant has the policy of restricting its investment to particular areas of the state, and if so, a description of such particular areas, or whether such applicant has no such restriction and may invest statewide;

6.3.2.6 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;

6.3.2.7 The amount of capital qualified by the Authority.

6.3.3 All information submitted to the Authority in regard to the semi-annual reports required by Subsection 4.1 of these Rules, including the affidavits required under Subsections 5.1 and 5.2 of these Rules, shall be considered confidential and not subject to public disclosure when filed with the Authority, except the following:

6.3.3.1 The name, address and phone number of each West Virginia Business receiving a qualified investment from a Qualified Company;

6.3.3.2 Whether each qualified investment was a debt investment, equity investment, capital lease or combination of such investments;

6.3.3.3 The classification of each West Virginia Business receiving a qualified investment from a Qualified Company as being 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; service industry; transportation; research and development of products or processes associated with any of the activities previously enumerated above; tourism; computer software development companies engaged in the creation of computer software; and wholesale or retail distribution activities within this state;

6.3.3.4 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; (vi) more than \$1,000,000.00.

6.3.4 All information submitted to the Authority regarding a ruling request pursuant to Section 8 of these Rules 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 not included.

6.3.5 All general correspondence of or to the Authority shall be considered confidential and not subject to public disclosure.

6.3.6 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 §5E-1-16 of the Act shall be considered confidential and not subject to public disclosure.

except where such public disclosure results from enforcement proceedings contemplated by §§5E-1-21(b) and (c) of the Act.

6.3.7 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.

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

6.3.9 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.

6.3.10 Any person or entity submitting information to the Authority which is classified as non-confidential by these Rules or the Act will be treated as non-confidential and subject to disclosure unless the person submitting the information makes a satisfactory showing at the time the information is submitted that the information should be treated as confidential under Section 5E-

i-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 under subsection (b) and the basis upon which such treatment is justified. If the Authority concurs with such 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.

6.4 Annual Board Authority Review. The Board Authority shall conduct an annual review of the Accountant's Report and Audit and any other information filed by a Qualified Company to determine if the company is abiding by the requirements of the Act and these Rules, to advise the company as to the qualification status of the investments, and to ensure that no investment has been made in violation of West Virginia Code §5E-1-12. The results of said annual review shall be used to notify the Tax Commissioner of any Qualified Companies that are not in compliance with the Act or these Rules.

6.5 Investigation by Board Authority. The Board Authority may examine, under oath, any of the officers, directors, partners, 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 Board Authority may deem necessary to ensure compliance with the Act and these Rules.

6.6 Non-Compliance Penalty. Any Qualified Company that fails to make qualified investments pursuant to these Rules 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 with interest at the rate of 1-1/2% per month, compounded monthly, from the date the said tax credits were certified as allocated to the Qualified 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 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 Subsection, the Tax Commissioner shall have all powers and Board 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.

6.7 Decertification. Failure of a Qualified Company to comply with the provisions of the Act or these Rules shall be grounds for decertification of the Company by the Board Authority pursuant to the Act.

6.8 Notice. If at any time the Board Authority determines that a Qualified Company is not in compliance with the requirements of the Act or these Rules, the Board 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 Board Authority for reconsideration and demands an administrative hearing. Such hearing shall be conducted as provided in Article 5, Chapter 29A of the Code.

6.9 Notice of Decertification. If a Qualified Company is not in compliance with the Act or these Rules following said ninety (90) day period provided by Section 6.8 of these Rules, the Board Authority shall send a notice of decertification to said Company and to the State Tax Commissioner. Decertification to a Qualified Company may cause the forfeiture of any right or interest to further tax credits under the Act or these Rules for the decertified company or for any Applicant, or for any Qualified Company seeking an increase in its capital base, in which any officer, general partner, managing partner, trustee, or investor served as an officer, general partner, managing partner, or trustee of any decertified Qualified Company.

6.10 Decertification Requested by Qualified Company. A Qualified Company, which has complied with the provisions of the

Act and these Rules including the provisions of Code §5E-1-12(b) and Subsection 5.10.1 of these Rules, desiring to lose its status as a Qualified Company under the Act but to remain in existence and not to dissolve or liquidate pursuant to Code §5E-1-12(c) or Section 7 of these Rules 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 these Rules. 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 these Rules.

Section 7. Dissolution or Liquidation of Qualified Company.

7.1 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 5.10.1 of these Rules and Code §5E-1-12(b) to be violated.

7.2 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:

7.2.1 A description of all qualified investments of the Qualified Company currently outstanding.

7.2.2 Information certifying that all qualified investments currently outstanding have been maintained or reinvested, pursuant to Code §5E-1-12(b) and Subsection 5.10.1 of these Rules, for a period of at least five years; or, if all qualified investments currently outstanding have not been so maintained or reinvested, such investments must be so identified.

7.2.3 Such additional information as may be requested by the Authority.

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

7.4. The Authority may perform an audit or examination of any Qualified Company requesting approval for dissolution or liquidation to ascertain or verify the company's compliance with Code §5E-1-12(b) and Section 5.10.1 of these Rules.

Section 8. Ruling Procedure.

8.1 A Qualified Company or the organizers of a Qualified Company may request a ruling from the Authority concerning the application of the West Virginia Capital Company Act and the regulations promulgated thereunder 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 State Tax Department.

8.2 A ruling request must meet the following requirements in order to be considered by the Authority:

8.2.1 The ruling request must be in writing and sent by certified mail to the Authority at the following address:

West Virginia Economic Development Authority
Capitol Complex
Building 6, Room 525
Charleston, West Virginia 25305

8.2.2 Any factual representations upon which the ruling will be based must be verified under oath;

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

8.2.4 The ruling must be accompanied by a non-refundable filing fee of Three Hundred Dollars (\$300.00) per ruling requested;

8.2.5 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

8.2.6 Any additional information requested by the Authority must be submitted in writing and verified under oath if the requested information involves factual representations.

8.3 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 so prospectively modified if the Authority determines that the ruling was incorrect or is in conflict with the statute, the regulations or any other substantive legal precedent.

8.4 The Authority may also decline to issue a ruling in which event the filing fee shall be returned to the person requesting the ruling. From time to time, the Authority may announce those areas in which it will not issue rulings.

Section 9. Transition Rules.

9.1 Given that the Act was substantially amended during the regular session of the Legislature in 1991, the following provisions, in accordance with Code §5E-1-19, shall provide transition guidelines for qualified investments.

9.1.1 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.

9.1.2 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.

9.1.3 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 provided that such refinancing or restructuring does not include any new investment by the Qualified Company.


9.1.4 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.

Section 10. Examples.

10.1 Any example provided in these Rules 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 these Rules as they are interpreted by the Authority and any court or governmental agency of competent jurisdiction.

SUMMARY OF PROPOSED LEGISLATIVE RULE
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY
TITLE 117, SERIES 1

The Proposed Legislative Rule is intended to clarify and provide for the general administration of the West Virginia Capital Company Act, W. Va. Code, §5E-1-1 et seq. (the "Act"), as amended by the 1991 Regular Session of the Legislature. These amendments became effective on June 9, 1991. To effectuate the same, the Proposed Legislative Rule amends the existing legislative rule. The amendments to the existing legislative rule include: (1) the insertion of a definition of "debt or debt financing"; (2) replacement of the current definition of "equity or equity financing"; (3) the clarification of the term "West Virginia Business"; (4) new provisions for capital base composition; (5) clarification of the formation of separate capital bases and increases to capital bases; (6) the deletion of references to tax credit carrybacks; (7) provisions regarding the 35-55-75 investment schedule; (8) new provisions clarifying the prohibition of "alter ego" investments; (9) new provisions clarifying the "management interlock" prohibition; (10) provisions relating to limitations on financial institutions; (11) new provisions regarding the sale or liquidation of qualified investments; (12) provisions regarding confidentiality; (13) new provisions regarding the dissolution or liquidation of capital companies; (14) ruling request procedures; and (15) transition rules.



David Warner
Director, West Virginia
Economic Development Authority

DESCRIPTION OF EXISTING LEGISLATIVE RULE
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY
TITLE 117, SERIES 1

The Existing Legislative Rule clarifies and provides for the general administration of the West Virginia Capital Company Act, W.Va. Code, §5E-1-1 et seq. (the "Act"). However, the Existing Legislative Rule, having been promulgated prior to the substantial and material amendment of the Act during the Regular 1991 Legislative Session, does not reflect and often contradicts the Act as amended in 1991.

The Existing Legislative Rule contains provisions, among others, which relate to the procedure by which capital companies are to be qualified, the use of tax credits, the procedure to be applied in forming separate capital bases or increasing existing capital bases, reporting requirements, investment restrictions, audits and investigations of capital companies, confidentiality, and decertification.



David Warner
Director, West Virginia
Economic Development Authority

TO: Legislative Rule-Making Review Committee

FROM: West Virginia Economic Development Authority

RE: Response To Comments Received During Comment Period on
the Proposed Legislative Rules Regarding the W. V.
Capital Company Act (Title 117, Series 1)

DATE: September 18, 1991

The West Virginia Economic Development Authority (the "Agency") has amended the legislative rule entitled "General Administration of the West Virginia Capital Company Act: Establishment of the Application Procedures to Implement the Act" by the filing of an Emergency Rule which became effective July 3, 1991. Such amendments were made in response to the 1991 amendments to the West Virginia Capital Company Act, W.Va. Code § 5E-1-1 et seq. (the "Act"). A comment period was held from June 28, 1991 to July 29, 1991. The letter attached hereto represents the only comments received during the comment period. The Agency responds to the attached comments as follows:

Response to Comment 1

The Agency has made the policy decision to maintain the definitions of "debt" and "equity" as these terms are respectively defined in §§1.7.1.10 and 1.7.1.16. The Agency's proposed definitions of "debt" and "equity" are supported by the following:

a. The proposed definitions promote the Act's goals of stimulating the investment of risk capital in certain West Virginia

industries and ensuring that these industries have a source of long-term risk capital. Allowing capital companies to enter into bridge, demand or other short-term investments does not provide the targeted industries with risk capital but allows capital companies to operate in a fashion similar to banking institutions.

b. The proposed regulations do not prohibit businesses invested in from repaying their debt before the five-year term expires, as such early repayment would simply trigger the reinvestment provisions of the Act and regulations.

c. The tax credit given pursuant to the Act in effect collateralizes fifty percent of all qualified investments made by capital companies, thus making most short-term investments without substantial risk.

d. Repayment of an investment prior to the expiration of five years triggers the reinvestment provisions of the Act. The reinvestment provisions allow capital companies up to thirty months to properly reinvest. A capital company making, for example, six-month loans and using the entire thirty month period to reinvest after repayment would, therefore, require thirty years to actually have the original amount invested in a qualified manner for a total of five years. The tax credit, however, is not spread over the thirty years but is granted in total up-front.

e. The requirements in the proposed regulations that debt instruments have a stated maturity date of at least five years and which prohibit options on equity investments within the initial five-year period do not exceed the scope of the Act and do not

conflict with any provision of the Act. See W.Va.Code, §29A-3-11(b).

Response to Comment 2

Amending §2.2.4 of the regulations to allow capital companies to deduct their expenses from their capital base would severely restrict the Agency's power to enforce the Act. Since §9 of the Act provides that tax credits extended to investors are not subject to recapture upon a capital company's non-compliance with the Act, the Agency's sole remedy is to seek penalties against the capital company itself. Therefore, with a capital company's capital base representing the State's only source of recovery upon non-compliance, the adequacy of such source should be maintained.

Furthermore, the fifty percent tax credit should adequately compensate capital companies for their expenses.

Response to Comment 3

Section 3.2 of the proposed regulations correctly deals only with increases to capital bases. Any increase in investors is adequately addressed in §3.2, as any such increase in investors would result in an increase in the capital base.

Response to Comment 4

The Agency would exceed the scope of its statutory authority by allowing apportionment among direct investors, as §8(c) of the Act provides only for apportionment among partners and

Subchapter S corporation shareholders. See W.Va.Code, §29A-3-11(b).

Response to Comment 5

The Agency, by allowing non-qualified investment in other West Virginia businesses not prohibited by §5.5.1, would go beyond the scope of the Act. See W.Va.Code, §29A-3-11(b). The proposed regulations have been drafted to comply with §7(c) of the Act, which states that "a qualified company shall maintain all of its capital base, except that which has been invested to meet the purposes of this article, 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 year which are obtained from and managed by a West Virginia corporation."

Response to Comment 6

Section 5.7 of the regulations adequately protects capital companies. Under §5.7, a capital company in control of the board of directors of a West Virginia business may replace management as long as no management position is assigned to an investor, director, officer or employee of the capital company. Any relaxation of the two quarter standard for lack of profitability and the twenty-four month maximum period for management involvement would open the door for abuses and make the management interlock prohibitions ineffective.

Response to Comment 7

The reinvestment requirements of §5.10.1.1 and the examples provided are sufficiently clear and do not warrant further change. The regulations provide a ruling mechanism which is intended to accommodate requests seeking clarification as to specific circumstances.

Response to Comment 8

Section 6.3.9 of the regulations was intentionally drafted to give the Agency the flexibility to quickly make minor adjustments to the confidentiality provisions. Section 6.3.9 is not intended to allow the Agency to materially amend the confidentiality provisions without following rule-making procedures.

Response to Comment 9

The amendment proposed by the comments would make the Agency incapable of curing mistakes. Furthermore, such amendment would unjustly allow a capital company receiving a ruling to continue, on the basis of the ruling, to make similar investments subsequent to a change in the Agency's policy or a change in the law which would prohibit such investments. In cases of amended rulings the constitutional rights of those affected are preserved by the requirement that such amendments be prospective in effect.

Response to Comment 10

Section 5.12 proposed in the comments would result in abuse by allowing the distribution of all funds not subject to reinvestment. For example, such new section would arguably allow the immediate distribution of twenty-five percent of each capital base given that only seventy-five percent of each capital base must be invested (and reinvested if repaid early) in a qualified manner. Furthermore, the Agency, for the same reasons outlined above in the response to comment 2, does not favor allowing expenses to be deducted from the capital base. Such expenses should be paid out of gross earnings.

Conclusion

The Agency declines to amend the proposed regulations as requested by the comments received.

David Warner

David Warner, Director
West Virginia Economic Development Authority

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Mr. David Warner, Director
West Virginia Economic
Development Authority
WV State Capitol
Building 6, Room 525
Charleston, WV 25305

Re: Comments to Proposed Regulations for
West Virginia Capital Company Act

Dear Mr. Warner:

Pursuant to the proposed Regulations filed by the Economic Development Authority on June 28, 1991, I provide the following general comments to proposed changes in the Regulations underlying the West Virginia Capital Company Act ("Act"), W. Va. Code § 5E-1 et seq.:

1. § 1.7.1.10 Debt or Debt Financing. We reiterate the previous informal comment, in our letter to you of June 14, 1991, that the definition of "debt" is too inflexible. Imposing a minimum stated term of five years unnecessarily limits the scope of available investments. This prevents Qualified Companies from making bridge loans or other short-term investments which may be reasonable or necessary based on the economic needs in a particular case. Since such a short-term investment would remain subject to the five-year reinvestment provisions of W. Va. Code § 5E-1-12(b) and Reg. § 5.10, there is no potential for abuse since the requisite investment will be maintained.

Also as stated in our letter of June 14, 1991, a similar comment was raised with regard to the restriction against five-year warrants for equity investments. If the definition of debt investment is changed, a similar change should be made with regard to the definition of equity under § 1.7.1.16.

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2. § 2.2.4 Requirements for Qualified Company. New language has been added in Reg. § 2.2.4 to clarify that if a Qualified Company's capital base falls below the \$1,000,000 minimum due to uncollectibility and write-off of qualified investments, it will not constitute a violation. This provision should clarify that any reduction in capital base as a result of expenses of the Qualified Company, including management fees, administrative expenses, legal and accounting fees, transactional costs, etc., should be similarly ignored.

3. § 3.2 Example 1 Increased Capital Base. This example, which addresses increases to capital bases, should be clarified to state that the same result occurs where there is a change in or an increase in the investors in the Qualified Company, since this determination is made with respect to the Qualified Company itself and not its investors.

4. § 4.7.6 Apportionment. The apportionment provisions of the Regulations, which allow credit to be freely allocated among members of investors which are partnerships, Subchapter S corporations or joint investors, should be expanded to allow any direct investors in any Qualified Company to allocate credits in the same manner. This is not inconsistent with the goals and policies of the Act, and merely clarifies what has been previously approved by rulings and which can be achieved by use of "second-tier" entities. The current Regulations provide unnecessary hurdles for investors in Qualified Companies and result in no furtherance of the policies of the Act.

5. §§ 5.1 and 3.10.2 Investments. Changes proposed in these sections would remove the category of West Virginia businesses not otherwise prohibited under Reg. § 5.5.1 from allowed investments by Qualified Companies. This unnecessarily restricts the ability of the funds to obtain an optimum return and also restricts the total available capital which could otherwise be invested in West Virginia businesses.

6. § 5.7 Management Interlock. We repeat the comment of our June 14, 1991 letter concerning the provisions of Reg. § 5.7.2 concerning prohibited management interlock. We suggest that the mechanical restrictions on the necessary continued period of losses in order to allow involvement of the Qualified Company in management is too long. Because of the essentially risky nature of many venture capital investments, a requirement that losses be maintained for six months before the Qualified

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Company can act to protect its investment is unwise and unnecessarily restricts Qualified Companies. Instead, they should be able to take action they believe reasonably necessary to avoid loss of the investment. Similarly, the twenty-four month maximum period for management involvement may be too short given that turn-around of the business may be difficult and it may be hard to find appropriate replacement management.

7. § 5.10.1.1 Reinvestment Requirements. We suggest that additional examples be included regarding reinvestment requirements for debt investments by Qualified Companies. Specifically, we propose the following:

Example 4.

A Qualified Company makes a \$100,000 qualified debt investment with a stated maturity date of five years at 10% interest payable monthly based upon "normal amortization" (as defined in subsection 5.10.1.1 of these rules) in Newco, a West Virginia Business. Newco makes the following payments of principal, in addition to all accrued interest:

Year 1	\$16,227 principal
Year 2	\$17,926 principal
Year 3	\$19,803 principal
Year 4	\$21,877 principal
Year 5	\$24,167 principal

This debt investment is considered to be maintained for the required five-year period and no reinvestment of any portion of this investment is required.

Example 5.

A qualified Company makes a \$100,000 qualified debt investment with a stated maturity date in excess of five years in X Co, a West Virginia Business. During the course of Year 1,

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X Co draws down the entire \$100,000 loan amount and pays interest only on the debt for this "drawn down" period and Year 2. X Co makes the following payments of principal, in addition to all accrued interest:

Year 1	\$ 0	principal
Year 2	\$ 0	principal
Year 3	\$25,000	principal
Year 4	\$25,000	principal
Year 5	\$25,000	principal
Year 6	\$25,000	principal

This debt investment is considered to be maintained for the required five-year period and no reinvestment of any portion of this investment is required."

8. § 6 Confidentiality. We raise some concern with § 6.3.9, which allows the Authority to change the scope of confidentiality. This exception is thus capable of swallowing the whole confidentiality rule, and is without statutory basis in the Act. W. Va. Code § 5E-1-21 requires that determinations respecting confidentiality and disclosure be by promulgation of rules. Thus, the Authority should not be able to change standards of disclosure on an ad hoc basis without following rule-making procedures.

9. § 8.3 Rulings. This section should be amended to clarify that once a ruling has been issued by the Authority, the recipient may continue to rely on that ruling as valid and binding authority, notwithstanding any later change by the Authority. Thus, any change shall be prospective only with respect to other parties and will not limit or restrict the ability of the recipient of the ruling to rely on it.

10. Distribution of Funds By Qualified Companies. We would suggest that the Regulations include a section with regard to distributions, setting forth clearly what funds are distributable by Qualified Companies. It is not even clear under the current Regulations that the earnings on qualified investments, as well as earnings on other funds held by Qualified Companies, are freely distributable. Similarly, it is not clear

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when returns of initial capital base, no longer subject to required reinvestment under § 5E-1-12(b), are distributable. Such a provision would also preclude the necessity of numerous and repetitious ruling requests to the Authority.

Therefore, a new section should be added concerning distribution. As an example, we would propose the following:

"§ 5.12 Distributions by Qualified Companies. All funds held by a Qualified Company and not otherwise subject to reinvestment under the requirements of W. Va. Code § 5E-1-12(b) and Subsection 5.10.1 of these rules, shall be freely distributable by the Qualified Company to its investors at any time."

We would further recommend adoption of examples concerning distributions, along the lines of the following examples:

*Example 1.

A. Qualified Company in Year 1 earns \$25,000 in interest and dividends on qualified investments and \$75,000 in interest income on the remainder of its capital base. During that same year it accrues \$20,000 of expenses, consisting of a management fee of \$12,000 and legal, accounting and transactional expenses of \$8,000.

For Year 1 the Qualified Company may distribute \$100,000 of gross earnings to its investors.

B. The same Qualified Company in Year 2 earns \$45,000 in interest and dividends on qualified investments and \$55,000 in interest income on the remainder of its capital base, and has the same \$20,000 of expenses. In addition, it receives \$10,000 of principal repayments on a qualified debt investment that satisfies the five-year

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amortization requirements of subsection 5.10.1.1 of these Rules.

For Year 2 the Qualified Company may distribute \$100,000 of gross earnings and \$10,000 of properly amortized principal to its investors.

C. If the same Qualified Company in Year 2 had also received \$5,000 of principal repayment on a qualified debt investment that did not satisfy the requirements of subsection 5.10.1.1 of these Rules, those amounts would not be distributable to the investors in the Qualified Company, but would instead be subject to the reinvestment requirements of W. Va. Code § 5E-1-12(b) and subsection 5.10.1 of these Rules.

Example 2.

A Qualified Company has completed and received repayment on all required Qualified Investments, which occurs after the five-year period set forth in W. Va. Code § 5E-1-12(b). It has previously distributed all gross earnings and paid all expenses. In the final year it has \$600,000 of liquidated qualified investments, \$100,000 of gross earnings for that year and \$20,000 of expenses, and remaining capital base of \$275,000 (after any losses on investments and payment of prior years expenses).

a) Current earnings of \$100,000 may be distributed at any time during the year.

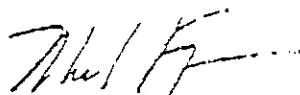
b) The remaining capital of \$855,000 (after current expenses) may be distributed to the Qualified Company's investors after it has complied with all requirements of Section 7 of these Rules.

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We thank you and appreciate this opportunity to provide written comments to these proposed Regulations, and ask that if you have any questions or wish any additional information, that you please contact the undersigned.

Yours truly,


Mark A. Ferguson

MAF:rm

*West
Virginia*



DEPARTMENT OF COMMERCE,
LABOR & ENVIRONMENTAL RESOURCES
OFFICE OF THE SECRETARY

State Capitol

Charleston, West Virginia 25305

304/348-3255

September 18, 1991

The Honorable Ken Hechler
West Virginia Secretary of State
Building 1, Suite 157-K
State Capitol
Charleston, West Virginia 25305

Dear Mr. Hechler:

I, John M. Ranson, as Cabinet Secretary of Commerce, Labor and Environmental Resources, approve the filing of the attached proposed legislative rule for the West Virginia Capital Company Act.

Sincerely,

John M. Ranson

John M. Ranson
Cabinet Secretary
Department of Commerce, Labor
and Environmental Resources

JMR/djo

Attachment