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ADMINISTRATIVE LAW DIVISION

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: West Virginia Economic Development Authority TITLE NUMBER: _____

CITE AUTHORITY Chapter 31, Article 15

AMENDMENT TO AN EXISTING RULE: YES NO

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

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

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

E. Ann Shabb

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

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

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EMERGENCY 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 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, 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__).

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 1, 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.

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.

1.7.1.7 Qualified West Virginia Capital Company or Qualified 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 qualified investments, and qualified by the Board.

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

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

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

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

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

1.7.1.15 Equity 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.

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

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

1.7.1.18 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.

1.7.1.19 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.

1.7.1.20 Qualified West Virginia Capital Company or Qualified Company shall mean a Certified West Virginia Capital Company that has been designated by the Board 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 Rules shall mean the Series One Legislative Rules promulgated pursuant to the Act.

1.7.1.22 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 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, operations and employees located in West Virginia.

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, the Board 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, in bank accounts and financial institutions, which are located in the State of West Virginia, or in such other cash equivalents which are obtained from and managed by a West Virginia corporation.

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.

2.2.5 No more than twenty five percent (25%) 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 Board.

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. In the event the Board 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 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.

2.3 Designation Requirements. An Applicant shall make written application for designation as a Qualified West Virginia Capital Company to the Board 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 Board has designated the Applicant a Qualified West Virginia Capital Company and the investor has received a certificate authorizing the tax credit approved by the Board 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, 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 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 apportioned, and statements signed by each partner, shareholder, or individual consents to the apportionment plan; all of which requirements are ore 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 Such additional information as may be requested by the Board.

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.

2.9 Action of Board. The Board shall consider all applications in the order they are placed on the agenda of any regularly scheduled meeting of the Board. The Board 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 shall allocate, in the order in which companies are qualified by the Board, 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 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 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 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 as part of its application filed under Sections 2 and 3 of these Rules or any other information submitted to the Board 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 Each fiscal year, a Qualified Company may apply to the Board for designation as qualified of a separate capital base. Such application for a 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. The procedures set forth in Section 2 of these Rules shall apply to the review of the application by the Director and the Board.

3.1.2 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. The procedures set forth in Section 2 of these Rules shall apply to the review of the application by the Director and the Board.

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 5.3 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 on a semi-annual basis, and shall file separate reports for each separate capital base that is designated as qualified by the Board. 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. Such reports shall be submitted to the Board 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 a tax credit;

4.1.2 The amount of each investor's investment;

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

4.1.4 All Qualified Investments the Qualified Company has made;

4.1.5 Such additional information as may be requested by the Board;
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 Qualified Company which has not received approval for the maximum tax credit of Two Million Dollars within a fiscal year may apply, under Section 3 of these Rules, three additional times during such fiscal year for additional credits of at least \$50,000 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 for all Qualified Companies may not exceed a total of Ten Million Dollars each fiscal year. The Board 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 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 or in which separate capital bases or increases in capital were designated as qualified by the Board, 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, 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 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 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);

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

4.7.3.1 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.

4.7.3.29 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.

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 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	<u>15,000</u>
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 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 is less than the tax credit applied for, in which case the Board 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 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.

4.8 Carry Back and Carry Forward of Unused Tax Credit

4.8.1 In general. Unused tax credit may be carried back and carried forward. Carrybacks and 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.

4.8.6 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.

4.8.7 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.

4.8.7.1 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.

4.8.7.2 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, 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 4.8.6 of these Rules.

4.8.7.3 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, 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 4.8.6 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.

4.8.7.4 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 4.8.7.3 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.

4.8.7.5 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.

4.8.7.6 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.

4.8.8 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 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 and Record Keeping

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 twenty-five percent (25%) of each capital base in equity or unsecured debt investments, provided that this requirement shall not apply to any capital base designated as qualified on or before May 30, 1989. 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. After an investment is made, the Qualified Company must obtain and submit to the Board 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, operations and employees are located in West Virginia;

5.1.3 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, 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; 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.

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 percent (20%) 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 or on which each separate capital base was designated as qualified by the Board;

5.3.2 At least forty percent (40%) 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 or on which each separate capital base was designated as qualified by the Board;

5.3.3 At least sixty percent (60%) 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 or on which each separate capital base was designated as qualified by the Board.

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.

5.5 Investment Restrictions. 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 Advisors, and Brokerage or Financial Firms;

5.5.2 Other Capital Companies;

5.5.3 Charitable and religious institutions;

5.5.4 Conventional oil and gas exploration;

5.5.5 Insurance Companies;

5.5.6 Residential Housing or Development; and

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

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.

5.7 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.

5.8 Sale or Liquidation of Qualified Investments

5.8.1 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.

5.8.2 A Qualified Company may sell or liquidate a qualified investment five years after making such investment, without any restriction on the use of such funds.

Section 6. Audits, Reports, 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. 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 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 period of three (3) years from the date of the audit report, or longer if so notified in writing by the Board before the end of the three (3) year period. The working papers shall be made available upon written request of the Board or the Director. The audit shall be conducted in accordance with generally accepted auditing and accounting principles and such other guidelines as the Board 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 Board 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 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.

6.4 Annual Board Review. The Board 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. The Board 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 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 Capital 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 in the State general fund. To carry out the provisions of this Subsection, the Tax Commissioner shall have all powers and authority granted to him under the West Virginia Tax Procedures and Administration Act and the regulations promulgated thereunder and the penalty may be assessed and collected in the same manner as other penalties are assessed and collected under that Act.

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 pursuant to the Act.

6.8 Notice. If at anytime the Board determines that a Qualified Company is not in compliance with the requirements of the Act or these Rules, the Board shall give such Qualified Company written notice of such non-compliance 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 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 shall send a notice of decertification to said Company and to the State Tax Commissioner. Decertification of 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.

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WEST VIRGINIA INDUSTRY AND JOBS DEVELOPMENT CORPORATION

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CAPITAL COMPANY PROGRAM PUBLIC HEARING

Tuesday, April 11, 1989
4:00 p.m.

The public hearing was held in Room M-146 of the State Capitol Building in Charleston, West Virginia to address the Emergency Regulations filed on March 9, 1989 in the Secretary of State's Office. Those present were:

- James R. Christie, Director of GOCID
- Mark Sadd, Charleston Daily Mail
- Zell Sunderland, United Huntington Industries
- Frank Vest, First State Fund and Odyssey Limited Partnership
- Steve Smith, United Venture Fund
- Marjorie Mahaney, MOVE Capital, Inc.
- Chris Thomas, Empire National Bank
- E. Ann Shabb, Executive Director, WVJDC

Steve Smith stated that he was attending the hearing to comment that United Venture Fund is very interested in banks remaining in the capital company program because they have a lot of capital. United Venture Fund was recently fortunate enough to make a loan for \$125,000 to a project. He felt we need the banks because of their credit analysis capabilities. The things that UVF would like to see changed would be the 40% percent limitation of any one bank entity participating in a fund rule. It would take a maximum of 20 banks investing in one fund with this requirement. If that regulation is made permanent it would eliminate the bank holding companies from the program. He thought the 25% requirement for equity type investments, was a good rule but recommended that the definition of equity needed to be expanded and should include at least convertible debt.

Frank Vest represented two funds, First State Fund and Odyssey Limited Partnership and indicated that they were very strong supporters of the West Virginia Capital Act. Their funds have the largest total capitalization. They also have raised an additional \$700,000 in one fund that they did not seek tax credits for. They've been very aggressive in making their investments. First State Fund has loaned in excess of the total cash amount available to them. They are very excited about the fact that they created and saved jobs and made their investments in some very rural parts of the state. They have three comments that they wrote Ann Shabb about: 1) They are concerned about the elimination of the investor full-recourse note which would jeopardize their ability to raise money for these funds. In their first fund, well over 60% of their capital was raised from out of state investors. The Odyssey fund, approaching half of their capital was raised from out of state sources. These investors are believers in the State of West Virginia, the rebounding of the economy and in their ability to identify projects that they would like to be involved. They are yield oriented investors that look basically for a return on cash. They have tentative commitments from current investors and additional investors to continue to fund additional venture monies in West Virginia. The elimination of this recourse note would jeopardize that investment. The use of the investor note impairs the

liquidity of the venture funds and their ability to make deals for entrepreneurs in West Virginia. Through very aggressive investments and making wise investments they believe they have returned the maximum to their investors and the state and have invested well in excess of the total amount of cash available to them because of the rollover of investment. They are on their second and in some cases, the third rollover of their funds after less than a year and a half. They would sponsor the fact that the investor note is a worthy part of the fund if used correctly.

2) The second concern was the requirement that 25% of the capital base must be invested in equity investments. They have a concern because of the potential loose definition of what an equity investment might be. In the extreme case, if it is not well defined or guidance not well given to the various venture funds, Mr. Vest is concerned that the venture funds would be coming to the WVIJDC with every investment to be sure that it would qualify. Further, given that the shades of gray between equity and debt are so multi-variant, he believes in terms of defining equity within the regulations that it would require attorneys, accountants, appraisers and again in an extreme condition, problems with certification given by the accountant at the end of each year of which certification includes compliance with the regulations. In their meeting they had earlier with representatives of the capital companies, Mr. Vest understood that there was an interest to work with the venture funds to develop the definition of what equity might be and determine how the use of that equity would enhance the program, perhaps by providing more seed or start-up capital, but not jeopardize some of the investment philosophy of the various venture funds. Mr. Vest said they would sponsor the requirement that a portion of the fund would be invested in equity. He suggested that no more than 25% of the 60% that the act requires be invested be considered or to make it more simple, 15% of the capital.

3) Their third observation was that the regulations as filed did not provide for grandfathering of funds that were in existence as of the time the regulations were filed. In their case, they have already adopted an investment philosophy and formed a venture fund with certain disclosures and tacit assurances to their investors that they would continue to operate under the rules and regulations as they existed in the initial form. They would suggest that the regulations be amended to reflect that any fund in existence be allowed to continue to exist under the older regulations.

Zell Sunderland, representing United Huntington Industries indicated their support of the West Virginia Venture Capital Act. They appreciate the cooperation they have had from WVIJDC during the time they have formed. Ms. Shabb has given them quite a bit of help. The main problem that they are concerned with is that since the fund is in existence that they would not be grandfathered. Also, in Section 4.8.8, which describes the non-assignability of tax credits they have had some specific problems that they would like to address in this meeting. For example, a doctor who was incorporated liquidates and now we're transferring the credits to the doctor of this corporation and he may have not used his credit. If they could just include an addition there.

On the other issues that have been mentioned here, they would not have any impact on United Huntington Industries. The limitation for borrowing could have a negative effect in the future but the overall feeling is that it is not a problem or hindrance.

Marjorie Mahaney of MOVE Capital, Inc. gave a background of the formation of their fund. Their primary concern was the 25% equity requirement because banks follow the federal guideline which restricts them to 50%. They thought that if they had a million dollar fund and had to invest 25% or \$250,000 in equity and if 5% of these companies was the maximum they could hold, problems could occur. The companies that they deal with in common stock is normally right around \$100,000. Their investment in that company would be \$5,000. It would take them 50 companies to make up the 25% requirement. They really couldn't see a small company giving away a lot of the company for 5% or \$5,000. The number of companies required to make up that 25% requirement because of the bank holding companies federal requirement would be burdensome.

The second thing that they wanted to address was the grandfathering issue.

Ms. Shabb asked for clarification if MOVE supported the 25% equity requirement or not. Ms. Mahaney replied that it needs to be more clearly defined and that it really eliminates a large part of the fund. She sees in the future that a problem may surface, but she thinks that there needs to be another way of addressing it. She's not against equity and she doesn't think any of the banks are against equity but because of the limitations on the bank holding companies imposed by the federal guidelines, it is almost impossible to meet the qualifications. She doesn't see any small companies that she deals with that would be willing to give 5% of their company for \$5,000.

There was discussion whether the banks would accept voting or non-voting stock for equity. Ms. Mahaney felt that it would be non-voting preferred stock but that it is an item that needs to be addressed when defining equity.

Ms. Shabb explained that she would keep everyone informed about the status of the rules and the definition for "equity" as well as any other developments. The timing is tentatively set for the amendments to be filed with the Secretary of State's office within the next few weeks, recognizing that she needs to meet with counsel and prepare a draft of any changes. The definition of equity would be made available to the venture capital companies prior to filing amendments with the Secretary of State's office.