

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

FILED

Nov 16 3 31 PM '95

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Form #7

Effective Date

Dec. 22, 1995 jc

NOTICE OF AN EMERGENCY RULE

AGENCY: West Virginia Economic Development Authority TITLE NUMBER: 117

CITE AUTHORITY: W. Va. Code §§ 29-A-1-2(d), and 5E-1-5

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

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

TITLE OF RULE BEING AMENDED: General Administration of the West Virginia Capital Company Act: Establishment of the Application Procedures to Implement the Act.

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: _____

TITLE OF RULE BEING FILED AS AN EMERGENCY: _____

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS: See attached.

David G. Warner
Signature

The existing Legislative Rules are imprecise, unclear and ambiguous with regard to the Authority's acceptance of applications (for designation of venture capital companies as "Qualified Companies," whose investors are thus entitled to tax credits under the Capital Company Act), its review of such applications, and its process for designation of applicants as qualified. Such imprecision, lack of clarity and ambiguity have resulted in the Authority being subjected to legal actions, in the form of mandamus proceedings, in each of the preceding two fiscal years relative to its application acceptance procedures. In defending such actions, the Authority has been forced to expend a substantial portion of its annual capital company legal budget. Moreover, such suits expose the Authority to potential liability of millions of dollars. Additionally, the pendency of the legal actions has forced the Authority to freeze the administration of the capital company program, thus delaying the participation in the program of entities lawfully entitled to so participate as well as delaying those entities' infusion of capital into West Virginia's economy.

The existing rules fail to provide adequate guidance to either the Authority or capital company program participants. Lack of guidance may result in deprivation of participants' rights, whether due to the Authority's misapplication or misinterpretation of the rules, or participants' mistakes or inaction due to confusion. Additionally, continued challenges to the Authority's administration of the program is likely to undermine confidence of participants and the public in the Authority, as well as in state government as a whole.

Amendments to the Capital Company act in 1993 have not been reflected in legislative rules. Those amendments directly pertain to the application process and have exacerbated the inadequacy of the existing rules.

The proposed emergency rules are intended to provide a precise and clear mechanism for the Authority's acceptance and review of applications, and its allocation of tax credits directly therefrom.

TITLE 117
LEGISLATIVE RULE
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY
SERIES 1

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

Section 1: § 117-1-1. General.

1.1. Scope.

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

1.2. Authority.

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

1.3. Filing Date.

~~June 23, 1993.~~ _____

1.4. Effective Date.

~~June 23, 1993.~~ _____

1.5. Citation.

These legislative rules may be cited as 117 C.S.R., Series 1, § 117-1-_____ (1993).

1.6. Definitions.

1.6.1. As used in these Rules:

a. "Act" means the West Virginia Capital Company Act, Article 1, Chapter 5E of the Code.

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

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

d. "Authority" means the West Virginia Economic Development Authority, provided for in Article 15, Chapter 31 of the Code.

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

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

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

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

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

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

g. "Certified West Virginia Capital Company" or "Certified Company" means (1) a West Virginia business development corporation created pursuant to Article 14,

Chapter 31 of this 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 for qualified investments after having become qualified, that has been certified as such by the Authority.

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

i. "Complete Application" means an application that contains all of the information required by these Rules, as determined by the Director.

j. "Debt or Debt Financing" means a loan to be repaid pursuant to a loan instrument with a stated maturity date of at least five (5) years, and which loan instrument shall be maintained by the Qualified Company for at least five (5) years pursuant to W. Va. Code § 5E-1-12(b) and Subsection 5.10.1 of these Rules, which is not subject to payment upon demand of the Qualified Company prior to its maturity date except upon acceleration due to default in terms and conditions ordinary and usual to loan instruments, and which is originally issued by a West Virginia Business to the Qualified Company.

k. "Decertification" means the action of the Authority of revoking the Qualified Status from a Capital Company, ~~in accordance with section 6.9 of these Rules.~~ Decertification may be involuntary due to a Capital Company's failure to comply with provisions of the Act or these Rules pursuant to Sections 6.7, 6.8 and 6.9, or voluntary pursuant to Section 6.10 of these Rules.

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

m. "Designate as Qualified" means, in reference to a separate capital base, the action of the Authority to in authorize authorizing a separate capital base for a Qualified Company and to in allocating available tax credits for relative to such separate capital base, and, in reference to an increase to capital base, the action of the Authority in authorizing an increase in a Qualified Company's capital base and in allocating available tax credits relative to such increase in capital base.

n. "Development Corporation" means a West Virginia Business Development Corporation created pursuant to Article 14, Chapter 31 of the Code.

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

p. "Equity" or "Equity Financing" means 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 and an ownership interest in a limited liability company. An investment otherwise meeting this definition shall not be considered as equity if the investment includes an option whereby the Qualified Company can compel the repurchase of the investment by the issuing corporation or any other person prior to the expiration of five (5) years from the date of purchase by the Qualified Company.

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

r. "Insurance Company" means any person engaged in the business of making contracts of insurance.

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

t. "Qualified Investment" means a debt or equity financing of a West Virginia Business, but only if the business is engaged in one or more of the following activities: Manufacturing; agricultural production or processing; forestry production or processing; mineral production or processing, except for conventional oil and gas exploration; provision of services in a service industry; transportation; research and development of products or processes associated with any of the activities previously enumerated above; tourism, an example of which is provided at 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 1.6.1.f of these Rules, to a West Virginia Business lessee engaged in one of the above enumerated activities is a qualified investment.

u. "Qualified West Virginia Capital Company" or "Qualified Company" means a Certified West Virginia Capital Company that has been designated by the Authority as a Qualified Capital Company under the provisions of W. Va. Code § 5E-1-6 and which has raised a minimum capital base of One Million Dollars to a maximum of Four Million Dollars per fiscal year, upon which capital base, tax credits are allocated.

v. "S Corporation" or "Subchapter S Corporation" means 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.

w. "State" means the State of West Virginia.

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

y. "SBIC" means any small business investment corporation organized under the Federal Small Business Investment Act of 1958, as amended, and approved as such by the appropriate federal agency(ies).

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

aa. "Service Industry" means a type of business that has ordinary characteristics of retail establishments except that services instead of goods are sold and the principal activity of which is furnishing service to the consuming public. Service industries

include, by way of example and not by way of limitation, barbershops, laundries and automobile repair shops.

Section 2: § 117-1-2. Procedure to Become a Qualified West Virginia Capital Company.

2.1. General Procedure.

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

2.2. Requirements for Qualified Company.

The following requirements shall apply as indicated to all Qualified Companies and/or 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 capital available for qualified investments.~~ a Certified West Virginia Capital Company.

2.2.2. A An Applicant or 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 interest bearing instruments with a maturity of less than one (1) year which are obtained from and managed by a West Virginia corporation. For purposes of these Rules, the phrase "interest bearing instruments with a maturity of less than one (1) year which

are obtained from and managed by a West Virginia corporation" shall include, by way of example and not by way of limitation, direct investment in interest bearing money management or similar accounts or certificates of deposit maturing in one (1) year or less obtained from a West Virginia branch office of a brokerage firm.

2.2.4. A An Applicant or 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 an Applicant or Qualified Company in any fiscal year exceeds Four Million Dollars, such amount in excess of Four Million Dollars shall not be eligible for tax credits under the Act for that fiscal year. After designation as a Qualified Company, a Qualified Company shall maintain its entire capital base in Qualified Investments or otherwise, as set forth in Sections 5.1 through 5.11 of these Rules. 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 W. Va. Code § 5E-1-7(d).

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

2.2.6. A An Applicant or 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, into 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 relative to the separate capital base or increase to capital base 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 Authority. In the event

the 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 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 An Applicant or Qualified Company must hold a valid West Virginia business registration certificate pursuant to article twelve, chapter eleven of the W. Va. 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 Authority on applications forms provided by the Director. The application form shall be signed and verified by the Applicant or by a duly authorized officer, partner, limited liability company member or manager or trustee of the Applicant and contain the following information:

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

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

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

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

2.3.8. Information that the Applicant has disclosed to all investors that the State of West Virginia is not liable in any manner for any damages which may result from or arise out of the provisions of the Act, 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 W. Va. Code § 5E-1-12 and ~~Sub~~Section 5.3 of these Rules;

2.3.10. A statement that the Applicant will comply with all requirements of the Act and these Rules, including without limitation, investment of its capital base in accordance with the provisions 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;

2.3.13. Information regarding whether the Applicant has been involuntarily decertified under Sections 6.7 through 6.9 of these Rules and whether any of the

Applicant's officers, general partners, managing partners, limited liability company members or managers, trustees or investors have ever served as officers, general partners, managing partners, limited liability company members or managers or trustees of any decertified Qualified Company;

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

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

2.3.16. The information required in ~~Sub~~Section 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 W. Va. Code, or is exempt from such registration-;

2.3.18. Such additional information as may be requested by the 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.~~ Application Acceptance and Review.

~~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 forty five (45) days of the application's receipt. In the event that the Director determines an application to be incomplete, the Director shall notify the Applicant, in writing, of the reasons for such determination and shall return the incomplete application to the Applicant. The Applicant may resubmit the application 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.~~

2.6.1. Acceptance in General.

Applications relative to tax credits available in a particular fiscal year shall be received and accepted by the Director on a first come, first served basis beginning on the opening of business on July 1 of that fiscal year (unless such date shall not be a business day of the Authority, in which case applications shall be received and accepted on the next following business day) and continuing thereafter on each business day in that fiscal year until all tax credits authorized for that fiscal year by the Act shall have been exhausted; subject, however, to the specific provisions of this Section 2.6. The Director shall record the time and date of receipt of an application.

2.6.2. Simultaneous Receipt.

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

2.6.3. Review of Applications.

The Director shall review all applications in the order of their receipt to determine if each application is complete, subject to Subsection 2.6.3.1 of these Rules below. Such determination shall be made within forty-five (45) days of the application's receipt. In the event that the Director determines an application to be incomplete, the Director shall notify the Applicant, in writing, of the reasons for such

determination and shall return the incomplete application to the Applicant. The Applicant may resubmit the application at any time after correcting the deficiencies stated in the notice. If the initial filing was substantially complete, as determined by the Director, 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.

2.6.3.1. Review of Simultaneously Received Applications.

In the event of simultaneously received applications, the Director shall first review such applications to determine the tax credits sought by each application, and the total of the tax credits sought by all the simultaneously received applications. If the total tax credits sought by all the simultaneously received applications exceeds the total tax credits then available for that fiscal year, the Director shall, within fifteen (15) days, but not earlier than five (5) days, after the receipt of such applications, conduct a lottery to determine the order of review of the simultaneously received applications. All Applicants that submitted simultaneously received applications shall be provided written notice of the lottery and be provided the opportunity for their designated representative to attend the lottery. To conduct the lottery, the Director shall: (1) prepare for each Applicant that submitted a simultaneously received application, on index cards of the same fundamental character, an index card setting forth the Applicant's name and the tax credits sought by the Applicant by its application; (2) deposit in a container one such index card for each Applicant; (3) select from the container, in a manner that the Director may not determine the Applicant set forth thereon, and draw from it one index card; (4) announce and record the Applicant whose index card was drawn and the amount of tax credits sought by that Applicant; and (5) repeat steps (3) and (4) until all Applicants' cards are drawn from the container. Each simultaneously received application shall be then reviewed for completeness by the Director in the order in which it was drawn from the container. Prior to, or at any time during the lottery process, one or more Applicants, by agreement or otherwise, may voluntarily decrease the amount of tax credits sought by its application, provided the minimum capitalization requirements of the Act and these Rules continue to be satisfied.

2.6.4. Exclusive SBIC Application Period.

From the opening of business of the Authority's Offices on July 1 of each fiscal year (unless such date shall not be a business date of the Authority, in which case the next following business day shall be the applicable date) until the close of business on December 27 of that fiscal year, applications will be received, accepted and reviewed by the Director only from Applicants who certify in their application that the investment of the entire capital base of the Applicant will be in one or more small business investment corporations (SBICs) organized under the provisions of the Federal Small Business Investment Act of 1958, and no applications will be received, accepted or reviewed from companies who do not so certify.

2.6.5. Open Application Period.

From the opening of business of the Authority's offices on December 28 of each fiscal year (unless such date shall not be a business date of the Authority, in which case the next following business day shall be the applicable date) until the close of business on June 30 of that fiscal year, applications from all Applicants will be received, accepted and reviewed by the Director regardless of the Applicant's certification as to investment in SBICs.

2.6.6. Premature Application.

Applications submitted to the Authority prior to the opening of business on December 28 of each fiscal year that do not contain the Applicant's certification that the investment of its entire capital base will be in one or more small business investment corporations will be deemed rejected by the Director regardless of actual physical receipt of the same by the Director and such applications will not be reviewed by the Director either before or after the December 28 deadline. Rather, the Applicant that submitted such application must resubmit a separate application at or subsequent to the opening of business on December 28 in order that the Applicant's application be considered received and accepted, and reviewed 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 meeting of the Authority. Complete applications shall be placed on such agenda in the order of their review by the Director.

2.9. Action of Authority.

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

2.10. Allocation of Tax Credits.

Upon designating an Applicant a Qualified West Virginia Capital Company, the Authority shall allocate, in the order in which companies are qualified so designated by the Authority, available tax credits for the investors in the Qualified Company, subject to Subsection 2.12 of these Rules.

2.11. Notification of ~~Qualification~~ Action.

The Director shall notify the Applicant in writing of the Authority's action designating or refusing to designate the Applicant a Qualified West Virginia Capital Company. and The Director shall issue to the a Qualified Company the Certificate of tax credit provided in SubSection 4.5 of these Rules. Such ~~Notice to a Qualified Company~~ shall set forth the level of equity capitalization that qualifies for tax credits under W. Va. Code Section ~~§5E-1-8~~. Notice to an Applicant not designated a Qualified Company shall set forth the reasons for such determination.

2.12. Suspension of Qualification Process.

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

Notwithstanding the above provisions of these Rules, in any fiscal year, upon the allocation to Qualified Companies of the total tax credits authorized for that fiscal year by the Act, the Authority shall suspend the qualification process and the Director shall reject all subsequently submitted applications. When, in any fiscal year, the total tax credits authorized in that fiscal year by the Act have previously been allocated to Qualified Companies, all applications received and then pending, and all applications thereafter submitted to the Director in that fiscal year will not be reviewed by the Director or considered by the Authority in that or any subsequent fiscal year. Rather, the Applicant that submitted such an application must resubmit a separate application

in a subsequent fiscal year in order to be eligible for tax credits in that subsequent fiscal year.

2.13. Additional Applications.

A Qualified Company which does not seek additional tax credits under Sections ~~3~~ 3.1 through 3.2 of these Rules is not required to file any additional application with the Authority to retain its status as a Qualified Company, provided that the Qualified Company remains in compliance with the requirements of the Act and these Rules.

2.14. Amendments.

A Qualified Company must notify the Director of any changes in any of the information filed with the Authority as part of its application filed under Sections ~~2 and 3~~ 2.1 through 3.2 of these Rules or any other information submitted to the 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 ~~Sub~~Section 4.1 of these Rules.

Section 3: § 117-1-3. Additional Tax Credits.

3.1. Separate Capital Base.

During each fiscal year, a Qualified Company may apply to the 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 for in Section 2.3 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 and 2.3.18 of these Rules, as they apply to the Qualified Company's separate capital base, with all references therein to Applicants, investors, capital bases and designation as a Qualified Company being read to apply to Qualified Companies applying for designation as qualified of a separate capital base, investors in the separate capital base, the separate capital base sought and designation as qualified of the separate capital base, respectively, and shall also amend its original application to reflect any changes in the information that it initially filed with the Authority. ~~The procedures set forth in Section 2 provisions of Sections 2.4 through 2.14 of these Rules shall apply to the application process, receipt and acceptance of applications, review of the applications by the Director, and action by the Authority and allocation of tax credits, with all references therein to Applicants and applications being read to apply to Qualified Companies applying for designation as qualified of a separate capital base and applications therefor, respectively. Each approval of an application under Subsection 3.1 of these Rules~~ Designation as qualified of a separate capital base will create a separate capital base for the Qualified Company. Each separate capital base shall be subject to all investment and reporting requirements of the Act and Sections 5 and 6 5.1 through 6.11 of these Rules, independent of any other capital base of the Qualified Company.

EXAMPLE.

Qualified Company, in fiscal year 1991, has a capital base of Two Million Dollars (\$2,000,000.00). In fiscal year 1992, Qualified Company may qualify a new and separate capital base (other than its original capital base of \$2,000,000.00), pursuant to Subsection 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 W. Va. Code § 5E-1-12(a) and Subsection 5.3 of these Rules.

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~~ to the Authority for designation as qualified of an increase in its existing capital base and additional tax credits thereon in accordance with ~~Sub~~Section 4.3 of these Rules ; provided, however, the maximum total amount to which an existing capital base may be increased is Four Million Dollars (\$4,000,000.00). The Qualified Company shall file an application on the form provided for in Section 2.3 of these Rules and shall provide the information required for ~~a~~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 and 2.3.18 of these Rules, as they apply to the increase of the Qualified Company's capital base, with all references therein to Applicants, investors, capital bases and designation as a Qualified Company being read to apply to Qualified Companies applying for designation as qualified of an increase to capital base, investors in the increase to capital base, the increase to capital base sought and designation as qualified of the increase to capital base, respectively, and shall also amend its original application to reflect any changes in the information that it initially filed with the Authority. The procedures set forth in Section 2 provisions of Sections 2.4 through 2.14 of these Rules shall apply to the application process, receipt and acceptance of applications, review of the applications by the Director, action by and the Authority and allocation of tax credits, with all references therein to Applicants and applications being read to apply to Qualified Companies applying for designation as qualified of an increase to capital base and applications therefor, respectively. 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. Designation as qualified of an increase to capital base will increase the Qualified Company's existing capital base regardless of the year in which the initial capital base was qualified, but tax credits resulting from the increase to capital base shall be allocated from tax credits authorized for the fiscal year in which application for such increase was made. All such increases and the initial capital base shall together constitute a single, ~~separate~~ total capital base. That total capital base shall be subject to all investment and reporting requirements of the Act and Sections 5.1 through 6.11 of these Rules, on a prospective basis, as if the total capital base was qualified in its entirety at the time of qualification of the initial capital base; provided, however, where a Qualified Company was designated as such prior to the 1991 amendments to the Act, and its increase to capital base was designated as qualified subsequent to such amendments, the pre-amendment requirements shall apply to the initial portion of the total capital base and the post-amendment requirements shall apply to the increase. Notwithstanding the above provisions, no increase to capital base shall be designated as qualified if, at the time of designation, the Qualified Company would be in violation of Subsection 5.3.3 of these Rules with regard to the total capital base.

EXAMPLE 1.

Qualified Company was qualified on February 1, 1989 with a capital base of \$1,000,000.00. Qualified Company wishes to increase its capital base pursuant to ~~Sub~~Sections 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 W. Va. Code § 5E-1-12(a) and Subsection 5.3 of these Rules. The \$500,000.00 increase occurs in Year ~~2~~3 of the original 20-40-60 investment schedule. Therefore, as illustrated below, by the end of Year ~~2~~3, Qualified Company must have invested in a qualified manner a total of ~~\$675,000.00~~ \$975,000.00 (40% ~~60%~~60% of the original \$1.0 million plus ~~55%~~ 75% of the \$500,000.00 increase). ~~By the end of Year 2, 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
	<u>2/1/89 - 2/1/90</u>
Cumulative Required Investment	\$200,000.00 (20% of \$1.0 million)
Total	<hr/> \$200,000.00
	Year 2
	<u>2/1/90 - 2/1/91</u>
Cumulative Required Investment	\$400,000.00 (40% of \$1.0 million)
	+
	\$275,000.00 (55% of \$500,000.00)
Total	\$675,000.00 <u>\$400,000.00</u>
	Year 3
	<u>2/1/91 - 2/1/92</u>
Cumulative Required Investment	\$600,000.00 (60% of \$1.0 million)

	+
	\$357,000.00
	<u>(75% of \$500,000.00)</u>
Total	\$975,000.00

EXAMPLE 2.

Qualified Company was qualified on February 1, 1987 with a capital base of \$1,000,000.00. In 1991, Qualified Company wishes to increase its original capital base by \$500,000.00. However, the original \$1,000,000.00 was subject to the 20-40-60 investment schedule under the Act prior to its 1991 amendment, while the \$500,000.00 increase, if approved, would be subject to the 35-55-75 investment schedule of W. Va. Code § 5E-1-12(a) and Subsection 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, Unless Qualified Company had invested \$975,000.00 (60% of the original \$1.0 million plus 75% of the \$500,000.00 increase) by February 1, 1990,~~ the \$500,000.00 increase in 1991 would not be approved as an increase to the original capital base. Furthermore, given that each separate capital base must be in the amount of at least \$1,000,000.00, Qualified Company would need to raise an additional \$500,000.00 to be able to form a separate capital base pursuant to ~~Sub~~Section 3.1 of these Rules.

Section 4: § 117-1-4. Tax Credits.

4.1. Semi-Annual Reports.

Each Qualified Company shall report to the Tax Commissioner and the Authority on a semi-annual basis, and shall file separate reports for each separate capital base that is designated as qualified by the Authority. 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 ~~Sub~~Section shall be made no earlier than six (6) months after the Company's designation as a Qualified Company, or the designation as qualified of a separate capital base, and shall continue until such Qualified Company is decertified by the Authority. Such reports shall be submitted to the Authority no later than thirty (30) 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 received, or is to receive, a tax credit as the result of investment in the subject capital base;

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

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

4.1.4. All Qualified Investments the Qualified Company has made;

4.1.5. Such additional information as may be requested by the 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.

If a Qualified Company has not received approval for the maximum tax credit of Two Million Dollars within any State fiscal year, such Qualified Company may apply, pursuant to ~~Sub~~Section 3.2 of these Rules, as many as three times during such State fiscal year for additional credits of at least \$50,000.00 each by seeking designation as qualified of increases to its capital base.

4.4. Total Credits; Allocation.

The total credits authorized by the Authority for all Qualified Companies may not exceed a total of Ten Million Dollars each fiscal year; provided, that for the fiscal year beginning the first day of July, 1992, ~~the fiscal year beginning on the first day of July, 1993 and the fiscal year beginning on the first day of July, 1994,~~ the total credits authorized by the Authority for all Qualified Companies may not exceed a total of Eight Million Dollars (\$8,000,000.00) each fiscal year; provided, however, that for the fiscal year beginning on the first day of July, 1993 and the fiscal year beginning on the first day of July, 1994, the total credits authorized by the Authority for all Qualified Companies may not exceed a total of Five Million Dollars (\$5,000,000.00). The Authority shall allocate these credits to Qualified Companies in the order ~~that~~ in which companies are designated as Qualified West Virginia Capital Companies or in which separate capital bases or increases to capital base are designated as qualified, as the case may be.

4.5. Certificate of Tax Credit.

The 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 Authority or in which separate capital bases or increases in capital were designated as qualified by the 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 Authority, signed and verified by the Qualified company or by a duly authorized officer, partner, limited liability company member or manager, or trustee of the Qualified Company, 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, a limited liability company or an individual joint investor, the tax credit shall be apportioned among the partners, the shareholders of the corporation, the members or the individual investors pursuant to the provisions of Subsection 4.7.6 of these Rules.

4.6. Investors Entitled to Tax Credit; Amount.

Any investor, including an individual, partnership, limited liability company or corporation, who makes an investment ~~in a Certified Company an Applicant that becomes is designated~~ a Qualified Company pursuant to these Rules or who makes an investment in a Qualified Company's separate capital base or increase to capital base that is designated as qualified, is entitled to a tax credit, as allocated under ~~SubSection~~ 2.10 of these Rules, equal to fifty percent (50%) of the investment, except as otherwise provided by the Act or these Rules. The partners of a partnership, the shareholders of an S corporation, the members of a limited liability company and individual joint investors shall be entitled to the credits allocated and authorized by the Authority for investments by the partnership, the S corporation, the limited liability company or the joint investors in accordance with the apportionment plan provided for in 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 W. Va. 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:

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

b. Amount of tax credit determined under W. Va. Code § 5E-1-8(c) for the taxable year and described in ~~Sub~~Section 4.6 of these Rules herein (tax credits earned).

4.7.3. Tax liability information.

a. 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 W. Va. Code § 11-13C-5(c) through (i), and in that order.

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 forward as hereinafter provided under ~~Sub~~Section 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 is then applied.

4.7.6. Apportionment.

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

b. The tax credit earned shall be apportioned among partners, S corporation shareholders, limited liability company members or individual joint investors in any manner they may select, provided that each such partner, shareholder, member or individual consents to an apportionment plan. The consent of a partner, shareholder, member 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, member or individual, or a person duly authorized to act on behalf of the consenting partner, shareholder, member or individual, stating that such partner, shareholder, member 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, member or individual and the amount apportioned to each partner, shareholder, member or individual under the plan. The consent of more than one partner, shareholder, member or individual may be incorporated in a single statement. The statement shall be filed with the application required pursuant to ~~Sub~~Section 2.3 of these Rules and shall be irrevocable and not subject to change after such filing unless the tax credit authorized by the Authority is less than the tax credit applied for, in which case the Authority may request the apportionment plan to be amended. Each partner, shareholder, member and individual consenting to an apportionment plan shall keep as part of his records a copy of the statement containing all of the required consents.

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

4.8.1. In general. Unused tax credit may be carried forward to succeeding taxable years but not beyond fifteen (15) years. 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 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. Limitation 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.

4.8.4. Joint Return by Husband and Wife. This Subsection prescribes additional rules for computing the tax credit 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.

a. 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 to such taxable year.

b. Continuous Use of Joint Return. If a husband and wife making a joint return for a taxable year made a joint return for each of the taxable years involved in the computation of the tax credit earned or the tax credit carryforward to such taxable years, the joint tax credit or tax credit carryforward to such taxable year is computed in the same manner as the tax credit carryforward of an individual as provided in Subsections 4.8.1 through 4.8.3 of these Rules.

c. From Joint to Separate Return. If a husband and wife making separate returns for a taxable year made a joint return for any, or all, of the taxable years involved in the computation of the tax credit earned or tax credit carryforward to such taxable year, the separate tax credit carryforward of each spouse to the taxable year is computed in accordance with Subsection 4.8.1 through 4.8.3 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.

d. Recurrent Use of Joint Return. If a husband and wife making a joint return for any taxable year made a joint return for one or more, but not all, of the taxable years involved in the computation of a tax credit carryforward to such taxable years, such tax credit carryforward to the taxable year is computed in the manner set forth in Subsection 4.8.4.c of these Rules. Such tax credit carryforward is considered a joint tax credit carryforward to such taxable year.

e. Joint Tax Credit Carryforwards. The joint tax credit carryforwards to any taxable year for which a joint return is made are all the tax credit carryforwards

of both spouses to such taxable year.

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

4.8.5. Tax credits not assignable. No portion of the tax credit earned by any investor shall be subject in any manner to alienation, sale, transfer or assignment, except that tax credits authorized by the Authority for investments by a partnership, an S corporation, a limited liability company or individual joint investors may be apportioned pursuant to Subsection 4.7.6 of these Rules.

4.9. Investment to Date.

The tax credit provided for in W. Va. Code Section 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 W. Va. Code Section 5E-1-12 and ~~Sub~~Section 6.6 of these Rules.

Section 5: § 117-1-5. Investment Reporting, Record Keeping,
Restrictions and Sale or Liquidation.

5.1. Investments.

A Qualified Company shall invest each separate capital base in Qualified Investments in accordance with the schedule set

forth in ~~Sub~~Section 5.3 of these Rules. The portion of each separate capital base of a Qualified Company not ~~be~~ required to be invested in Qualified Investments pursuant to Section 5.3 shall be maintained or invested by the Qualified Company in one or more of the following: (i) in Qualified Investments; (ii) in bank accounts and financial institutions which are located in the State of West Virginia; and (iii) such other interest bearing instruments with a maturity of less than one (1) year which are obtained from and managed by a West Virginia corporation, as defined in Subsection 2.2.3 of these Rules. After ~~an~~ a Qualified Investment is made, the Qualified Company must obtain and submit to the Authority with the next semi-annual report of said Company, required to be filed pursuant to ~~Sub~~Section 4.1 of these Rules, affidavits prepared by any authorized officer, ~~or~~ partner, limited liability company member or manager, or trustee 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 1.6.1.x of these Rules, are located in West Virginia;

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

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

5.2. Affidavit from Qualified Company.

The Qualified Company shall submit to the Authority, contemporaneous with the filings required under ~~Sub~~Section 5.1 of these Rules ~~herein~~, affidavits prepared by an authorized officer, partner, limited liability company member or manager, 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 ~~Sub~~Section 5.5 of these Rules;

5.2.2. That the business invested in is a West Virginia Business as defined in Subsection 1.6.1.x of these Rules; and

5.2.3. ~~If a Qualified Investment,~~ ~~t~~That the West Virginia Business invested in is engaged in activities that meet the requirements of a Qualified Investment, as specified in Subsection 1.6.1.t 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 thirty-five percent (35%) of its capital base within one (1) year of the date on which the Qualified Company was designated as a Qualified West Virginia Capital Company by the Authority or, relative to a separate capital base designated as qualified pursuant to Section 3.1 of these Rules, within one (1) year of the date on which each that separate capital base was designated as qualified by the Authority;

5.3.2. At least fifty-five percent (55%) of its capital base within two (2) years of the date on which the Qualified Company was designated as a Qualified West Virginia Capital Company by the Authority or, relative to a separate capital base designated as qualified pursuant to Section 3.1 of these Rules, within two (2) years of the date on which each that separate capital base was designated as qualified by the Authority;

5.3.3. At least seventy-five percent (75%) of its capital base within three (3) years of the date on which the Qualified Company was designated as a Qualified West Virginia Capital Company by the Authority or, relative to a separate capital base designated as qualified pursuant to Section 3.1 of these Rules, within three (3) years of the date on which each that separate capital base was designated as qualified by the 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 ~~Sub~~Section, equity shall mean the total of all the capital bases designated as qualified by the Authority. The investment by a Qualified Company of an entire separate capital base, or any part thereof, in a SBIC is not violative of Section 5E-1-13(a) of the Act or this Section 5.4 of these Rules, provided investments by the SBIC fully satisfy the requirements of the Act and these Rules as if the Qualified Company, itself, had made such investments.

5.5. Investment Restrictions.

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

- a. Banks;
- b. Savings & Loan Associations;

- c. Credit Companies;
- d. Financial or Investment Advisors;
- e. Brokerage or Financial Firms;
- f. Other Capital Companies; provided, however, a SBIC in which all or part of a Qualified Company's capital base is invested shall not be deemed a "Capital Company" for purposes of this Subsection;
- g. Charitable and religious institutions;
- h. Businesses engaged in ~~C~~onventional oil and gas exploration;
- i. Insurance Companies;
- j. Businesses engaged in Residential Housing or Development; and
- k. Any other business which the 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 1.6.1.t 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 prior to making such investment.

5.6. Alter Ego Investments Prohibited.

~~5.6.1. Substantially Related. W. Va. Code Section 5E-1-13(b)(1) prohibits a Qualified Company from making investments of any portion of its capital base, or other investments, in a business which is "substantially related" to that is the "alter ego" of the Qualified Company.~~

5.6.1. Substantially Related. A business is an alter ego of a Qualified Company if the ownership of the business is "substantially related" to the ownership of the Qualified Company. Ownership of a business and a Qualified Company are "substantially related" shall mean that if one or more of the following conditions are present at the time the investment is made or while the investment is outstanding:

~~a. 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;~~

a. Any investor in the Qualified Company is, or is a relative (as defined in Subsection 5.6.3 of these Rules) of, an investor in or owner of the business. An investor in any parent business shall be deemed an investor in all subsidiaries thereof for the purposes of this Subsection.

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

b. 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~~ (1) 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, or (2) applying the invested funds to a purpose that will, clearly and naturally, substantially benefit an investor in the Qualified Company or any business owned or controlled by an investor in the Qualified Company;

EXAMPLE 1

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

EXAMPLE 2

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

c. 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;

d. 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" and, pursuant to Subsection 5.6.1.d of these Rules, ownership of XYZ and Qualified Company are "substantially related." Therefore, XYZ would be "substantially related" to an "alter ego" of Qualified Company and Qualified Company's investment in XYZ would be prohibited.

EXAMPLE 2

Qualified Company owns eighty-five percent (85%) of the stock of XYZ, a West Virginia Business which manufactures widgets. Qualified Company paid \$85,000.00 for 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" and, pursuant to Subsection 5.6.1.d of these Rules, and XYZ would not be "substantially related" to an "alter ego" of 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~~ under Subsection 5.6.1.d 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. ~~W. Va. Code Section 5E-1-13(b)(2) prohibits a Qualified Company from controlling the board of directors of the West Virginia Business~~ A business is an alter ego of a Qualified Company if the board of directors of the business is controlled by the Qualified Company, unless control consists of no more than a simple majority of the board. In order to determine control, directors representing the Qualified Company will include ~~directors of the West Virginia Business that are~~ (i) employees, officers, directors, limited liability company managers or other management personnel of the Qualified Company; (ii) persons who are investors in the Qualified Company; or (iii) persons who are related by blood or marriage to or are the stepchild, stepparent, stepbrother or stepsister relatives (as defined in Subsection 5.6.3 of these Rules) of an investor in, the Qualified Company or an employee, officer, director, limited liability company manager or other management official of, the Qualified Company. Non-Qualified Company directors shall include individuals who do not meet the preceding conditions, ~~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, members or managers in the case of a limited liability company and the management committee or similar decision making body in the case of a joint venture.

5.6.3. For purposes of Section 5.6 of these Rules, the term "relative" means a blood relative, a spouse or a person who is a blood relative of a spouse, including persons so related by a step or adoptive relationship, or a member of a common household. For purposes of ~~SubSection~~ 5.6 of these Rules, the term "blood relative" or "related by blood" shall include children, grandchildren, parents, grandparents, lineal

descendants, ancestors, brothers and sisters, nephews and nieces, uncles, and 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 B~~business or from dishonesty of the persons managing the ~~West Virginia B~~business or from the death or unanticipated departure of a person occupying a key management position in the ~~West Virginia B~~business, a Qualified Company is prohibited from managing the ~~West Virginia B~~ any business in which the Qualified Company has invested. Therefore, unless otherwise provided, no investor, director, officer or employee of the Qualified Company can occupy a management position in the ~~West Virginia B~~ such a 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 or office, other than membership on the board of directors, however described by title or office, where the individual has responsibility for and authority over all or any portion of the day-to-day operations of the ~~West Virginia B~~business. In the case of a general partnership or a limited liability company, a general partner or member shall not be deemed to occupy a management position in the ~~West Virginia B~~business merely because such general partner or member regularly exercises his voting rights as long as such general partner or member is not responsible for and does not have authority over all or any portion of the day-to-day operations of the ~~West Virginia B~~business.

EXAMPLE

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

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 B~~business, the Qualified Company must be able to demonstrate that the expenses of the ~~West Virginia B~~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 B~~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 (24) months, even if profitability is not restored at the end of such twenty-four (24) 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." Where dishonesty in management is established, an investor, director, officer or employee of the Qualified Company may serve as an interim replacement of existing management for a maximum period of six (6) months.

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 (6) 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 Qualified 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 total of all the capital bases and additions to capital bases of a Qualified Company designated as qualified by the Authority.

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 W. Va. Code Section 5E-1-20:

a. A holding company of such financial institution;

b. A wholly owned subsidiary of such financial institution;

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

d. 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, ~~or any affiliate thereof,~~ 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, members or managers in the case of a limited liability company and the management committee or similar decision-making body in the case of a joint venture.

5.10. Sale or Liquidation of Qualified Investments.

5.10.1. A ~~qualified~~ West Virginia Qualified Company shall maintain its ~~Qualified~~ ~~Investments~~ for a period of at least five (5) 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 (24) months from the date of repayment or return, unless a waiver is obtained from the Authority prior to the end of said twenty-four (24) month period: Provided, That such returned amounts may be accumulated for six (6) months before the aforesaid twenty-four (24) month period commences.

a. For purposes of Subsection 5.10.1 and W. Va. Code Section 5E-1-12(b), a debt investment, as defined at Subsection 1.6.1.j of these Rules, shall be considered to be "maintained" for the required five-year period (i) to the extent of the amount written off, when ~~(i)~~ such debt investment becomes uncollectible and is

written-off by the Qualified Company; (ii) to the extent of amounts repaid, when the unpaid balance is subsequently written-off and installment payments received by the Qualified Company each year did not exceed thirty percent (30%) of the original principal balance or, if such payments did exceed such thirty (30%) limit, they were determined by a normal amortization schedule based upon at least a five (5) year term; or ~~(ii)~~ (iii) to the extent of the entire investment, when such debt investment is not repaid in full for at least five (5) years and installment payments received by the Qualified Company each year during the required five-year period do not exceed thirty percent (30%) of the original principal balance, except that installment payments received by the Qualified Company each year during the required five-year period may exceed thirty percent (30%) of the original principal balance if such installment payments are determined by a normal amortization schedule. If a Qualified Company has not maintained a debt investment for the required five year period because ~~it has received~~ it has received installment payments during any one year of the required five-year period, not determined by a normal amortization schedule, which exceed thirty percent (30%) of the original principal balance of the debt investment, during any one year of the required five year period, or if a Qualified Company receives repayment in full of a debt investment prior to the end of the five (5) year period, the Qualified Company shall reinvest all repaid principal pursuant to Subsection 5.10.1 of these Rules and W. Va. Code Section 5E-1-12(b), but the amount of any while the remaining unpaid principal balance will remain a Qualified Investment and need not be reinvested if thereafter maintained 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 (5) years in XYZ, a West Virginia Business. XYZ makes payments to Qualified Company so that the following amounts of the principal balance are repaid in the first two (2) years:

Year 1: \$10,000.00 principal repaid

Year 2: \$31,000.00 principal repaid

B. The repayment of \$31,000.00 of principal in Year 2 violates the thirty percent (30%) limitation in Subsection 5.10.1.a 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 W. Va. Code Section 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 (5) years in XYZ, a West Virginia Business. XYZ makes payments to Qualified Company so that the following amounts of the principal balance are repaid in the first four (4) years:

Year 1: \$25,000.00 of principal repaid

Year 2: \$25,000.00 of principal repaid

Year 3: \$25,000.00 of principal repaid

Year 4: \$25,000.00 of principal repaid

B. The repayment of principal in Years 1 - 4 does not violate the thirty percent (30%) limitation of Subsection 5.10.1.a. However, since the entire principal balance has been repaid by the end of Year 4, the investment has not been maintained for at least five (5) years and, therefore, must be reinvested pursuant to Subsection 5.10.1 and W. Va. Code Section 5E-1-12(b).

EXAMPLE 3.

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

Year 1: \$10,000.00 principal repaid

Year 2: \$15,000.00 principal repaid

B. In Year 3, the remaining \$75,000.00 of principal due

on this debt investment becomes uncollectible and is written-off by Qualified Company as a bad loan. The entire debt investment is considered maintained for the required five-year period and no reinvestment of any portion of this investment is required.

b. 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~~ West Virginia business in advance of the required five-year period, repayment in advance of the required five-year period due to default by the ~~debtor~~ West Virginia business and acceleration of the loan, or otherwise, must reinvest its repaid or returned principal cost basis in the investment as is required by W. Va. Code Section 5E-1-12(b) and Subsection 5.10.1 of these Rules.

c. For purposes of Subsection 5.10.1 and W. Va. Code Section 5E-1-12(b), an equity investment, as defined at Subsection 1.6.1.p of these Rules, shall be considered to be "maintained" for the required five-year period, to the extent of the amount not recovered and written-off, upon the dissolution, liquidation or other termination of operations of the West Virginia business.

ed. A Qualified Company desiring a waiver from the Authority of its obligation to reinvest its repaid or returned ~~principal in cost basis~~ from a ~~Qualified Investment~~ which has not been maintained for the required five-year period pursuant to W. Va. Code Section 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. 1018 Kanawha Blvd., Suite 501, Charleston, WV 25301-2828.

The request shall contain the name, mailing address, and telephone number of a person that can be contacted by the Authority for further information concerning the request. The Qualified Company shall provide any additional information requested by the Authority regarding a waiver request.

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

- a. In Qualified Investments;
- b. In bank accounts and financial institutions which are located in the State of West Virginia; and
- c. Such other interest bearing instruments with a maturity of less than one (1) year which are obtained from and managed by a West Virginia corporation, as defined in Subsection 2.2.3 of these Rules.

5.11. Equity Capitalization Over Four Million Dollars.

If a Qualified Company raises capital in excess of Four Million Dollars in a fiscal year, the capital in excess of Four Million Dollars does not constitute a part of the capital base of said company and is not subject to the restrictions and requirements of Sections 5 5.1 through 5.11 of these Rules.

5.12. Special SBIC Investor Rules.

5.12.1. Qualified Company with SBIC Status. A SBIC Investor designated as a Qualified Company may retain all or any part of its capital base, and need not invest such sums in another SBIC, if such Qualified Company has obtained SBIC status. Such a Qualified Company shall make Qualified Investments in full compliance with the Act and these Rules, as well as with the federal Small Business Investment Act and the federal regulations thereunder.

5.12.2. SBIC Investor and SBIC Investment Requirements. The capital base of any SBIC Investor designated as a Qualified Company, the separate capital base designated as qualified of a SBIC Investor previously designated a Qualified Company, and the entire capital base of a SBIC Investor previously designated a Qualified Company for whom is designated as qualified an increase to capital base shall be invested in accord with all provisions of the Act and these Rule by:

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

b. The one or more SBICs in which the capital base is invested, as if each such SBIC is a separate Capital Company with a capital base equal to the amount invested by the Qualified Company in that SBIC (except to the extent the requirements of the federal Small Business Investment Act and the federal regulations thereunder are

in direct conflict with the Act and these Rules).

In the event such a SBIC fails to comply with the requirements of this Subsection 5.12.2, the Qualified Company whose capital base is invested in such SBIC shall be deemed to have failed to comply with the provisions of the Act and these Rules, and shall be subject to all consequences of such.

5.12.3. SBIC Investor Reporting Requirements. After an investment is made by a Qualified Company in a SBIC, the Qualified Company shall include in its next semi-annual report submitted pursuant to Section 4.1 of these Rules (1) a statement of the amount invested in any one or more SBICs, (2) the identity of such SBICs, and (3) documentation sufficient to satisfy the Authority that such SBICs have been approved as SBICs by the federal Small Business Administration and remain in goodstanding as such. After a SBIC in which any Qualified Company's capital base is invested has invested funds in one or more third parties, any Qualified Company whose capital base is invested in such SBIC shall include in its next semi-annual report submitted pursuant to Section 4.1 of these Rules a statement of investments made by such SBIC (including the amount and recipient of such investment) and the percentage of each such investment allocable to the Qualified Company's investment in such SBIC. Calculation of such percentage shall be determined by dividing the then unallocated amount of the Qualified Company's investment in the SBIC by the total investments in the SBIC by all parties available for investment immediately preceding the SBIC's investment at issue.

EXAMPLE.

In year one, Qualified Company invests 5X dollars in SBIC, and others invest 2X dollars in SBIC. Thereafter, SBIC invests 3X dollars in business A and 1X dollars in Business B. The percentage of each investment allocable to Qualified Company is 71%, and is calculated by dividing the then unallocated investment of Qualified Company, 5X dollars, by the total investments of the SBIC available for investment, 7X dollars ($5 \div 7 = .71$). Hence, in year one, 71% of the 3X dollar investment in Business A, or 2.14X dollars is allocable to Qualified Company's investment in SBIC, and 71% of the 1X dollar investment in Business B, or .71X dollars, is allocable to Qualified Company's investment in SBIC, for a total allocation of 2.85X dollars. In year two, Qualified Company invests an additional 4X dollars in SBIC, and others invest an additional 2X dollars in SBIC. In that year, SBIC invests 3X dollars in each of Businesses D, E and F. The percentage of each year two investment allocable to Qualified Company is 68%, calculated by dividing the then unallocated investment of Qualified Company, 6.15X dollars ($4X$ dollar year two

investment plus 2.15X dollars unallocated from year one (5X dollars total year one investment - 2.85X dollars allocated in year one = 2.15X dollars unallocated)), by the total investment in the SBIC available for investment, 9X dollars (Qualified Company's 4X dollar year two investment plus others' 2X dollar year two investment + 3X dollars remaining uninvested from year one investments). Hence, 68% of the 3X dollar investment in each of Businesses D, E, and F, or 2.05X dollars, is allocable to Qualified Company's investment in SBIC, for a total year two allocation of 6.15X dollars. The total investment by Qualified Company (5X dollars in year one and 4X dollars in year two, a total of 9X dollars) has thus been accounted for (2.85X dollars in year one and 6.15X dollars in year two).

After a SBIC in which a Qualified Company's capital base is invested has invested funds in one or more third parties, the Qualified Company shall obtain and submit affidavits prepared by officers, partners or managers of all third parties in which such investments were made, and affidavits prepared by authorized officials of the SBIC, pursuant to Sections 5.1 and 5.2 of these Rules, respectively, as if the SBIC were a Qualified Company and the third parties were businesses invested in by such Qualified Company.

Section 6: § 117-1-6. 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 first fiscal year of the Company, and ~~continuing~~ each year thereafter until such Qualified Company is decertified by the Authority. In addition, ~~an~~ such audits shall be conducted for each capital base of the Qualified Company designated as qualified. Such audits shall also continue until such Qualified Company is decertified by the Authority, and may be consolidated and submitted with ~~all~~ any other audits required under this ~~Sub~~Section, so long as ~~the requirements~~ information required under the Act and these Rules with respect to each capital base ~~are~~ is separate and distinct. Provided, however, in the case of the capital base of a Qualified Company designated as such, or a separate capital base or increase to capital base designated as qualified, prior to the 1991 amendments to the Act, audits with respect to the capital bases so qualified need not be conducted after the expiration of a five year period beginning from the date of the last of such designations if the Qualified Company is not then actively investing but is instead merely maintaining existing investments pursuant to the requirements of the Act and these Rules. In such cases, in lieu of

audits, the Qualified Company shall annually file internally prepared unaudited financial statements accompanied by an affidavit setting forth (1) the name of the Qualified Company; (2) the name and title of the affiant; (3) that the affidavit is submitted in connection with the internally prepared financial statements of the Qualified Company; (4) the time period covered by the financial statements; (5) that there have been no material or significant changes in the Qualified Company's Qualified Investments for the time period specified, or what, if any, such changes have occurred; and (6) that the financial statements are true, complete and accurate.

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

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 Authority no later than ninety (90) days from the end of each fiscal year, together with three copies of a descriptive narrative of the Qualified Company's activities, its 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 Authority may require.

6.3. Confidentiality.

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 6.3 of the Rules and in ~~§§~~ Sections 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 ~~Sub~~Section 3.1 of these Rules, and (iii) application for designation as qualified of an increase to capital base pursuant to Subsection 3.2 of these Rules, and documents related to such applications, shall be considered confidential and not subject to public disclosure when filed with the Authority, except the following:

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

b. The mailing and office addresses and telephone number of such applicant;

c. The name of a person to contact for such applicant;

d. The names of all directors, officers, managers or managing partners of such applicant;

e. 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;

f. 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;

g. 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 ~~Sub~~Section 4.1 of these Rules, including the affidavits required under ~~Sub~~Sections 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:

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

ab. The name, address and phone number of each West Virginia Business receiving a ~~Q~~Qualified ~~I~~Investment from ~~a~~ that Qualified Company;

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

ed. 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. In which one or more of the following activities each West Virginia Business receiving a Qualified Investment from the Qualified Company is engaged, specified as to the West Virginia Business: manufacturing; agricultural production or processing; forestry production or processing; mineral production or processing, except for convention oil and gas exploration; provision of services in a service industry; transportation; research and development of products or processes associated with any of the activities previously enumerated above; tourism; computer software development companies engaged in the creation of computer software; and wholesale or retail distribution activities within this state; and

de. Whether the amount of each ~~Q~~Qualified ~~I~~Investment in a West Virginia Business is: (i) not more than \$50,000.00; (ii) more than \$50,000.00, but not more than \$100,000.00; (iii) more than \$100,000.00, but not more than \$250,000.00; (iv) more than \$250,000.00, but not more than \$500,000.00; (v) more than \$500,000.00, but not more than \$1,000,000.00; or (vi) more than \$1,000,000.00, specified as to the West Virginia Business.

6.3.4. All information submitted to the Authority regarding a ruling request pursuant to Sections 8.1 through 8.4 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 W. Va. Code Section § 5E-1-16 and Sections 6.1, 6.5 and 6.11 of these Rules shall be considered confidential and not subject to public disclosure, except where such public disclosure results from enforcement proceedings contemplated by W. Va. Code § Section 5E-1-21(b) and (c).

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 W. Va. Code § Section 11-10-5d shall be confidential, except for such information subject to disclosures authorized, mandated or permitted pursuant to W. Va. Code §§ Sections 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~~ satisfactory to the Authority, at the time the information is submitted that the information should be treated as confidential under W. Va. Code § Section 5E-1-21(b). Any person desiring to make such a submission shall indicate in writing what information is requested to be treated in a confidential manner under ~~subsection (b)~~ said section of the Act and the basis upon which such treatment is justified. A person making such a request may submit the information desired to be treated as confidential separately from other information submitted. 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.

6.3.11. Notwithstanding any provisions of the Act or these Rules, any record, report, document or information may be disclosed to any officers, employees or authorized representatives of the State of West Virginia charged with administering the provisions of the Act and these Rules and may be disclosed pursuant to proceedings under W. Va. Code Section 5E-1-16(b) and Section 6.5 of these Rules; provided, however, the provisions of the West Virginia Code regarding confidentiality and the disclosure of tax returns and tax information, including without limitation W. Va. Code Section 11-10-5d, apply to the Authority, its agents and employees and to information submitted to the Authority under the Act and these Rules.

6.4. Annual Authority Review.

The Authority shall conduct an annual review of the Accountant's Report and Audit required by W. Va. Code Section 5E-1-16(a) and Section 6.1 of these Rules 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 qualified status of the its investments, and to ensure that no investment has been made in violation of W. Va. Code § Sections 5E-1-12 and 5E-1-13 and Sections 5.1 through 5.11 of these Rules. 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 Authority.

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

6.6. Non-Compliance Penalty.

Any Qualified Company that fails to make or maintain 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 of 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 or maintain ~~Qualified~~ Investments. The Tax Commissioner shall deposit any amounts received as penalties hereunder to the State general fund. To carry out the provisions of this ~~sub~~Section, the Tax Commissioner shall have all powers and authority granted to him under the West Virginia Tax Procedures and Administration Act and the regulations promulgated thereunder and the penalty may be assessed and collected in the same manner as other penalties are assessed and collected under that Act.

6.7. Involuntary 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 Authority pursuant to Section 5E-1-17 of the Act and these Rules.

6.8. Notice.

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

6.9. Notice of Decertification.

If a Qualified Company is not in compliance with the Act ~~or~~ and these Rules following said ninety (90) day period provided by Section 6.8 of these Rules (unless an administrative hearing was demanded, in which case the Qualified Company will be provided a period to cure noncompliance beginning on the date of issuance of a decision supporting the Authority's decertification actions and equal to ninety (90) days less the number of days from issuance of the notice required by Section 6.8 of these Rules to the Qualified Company's filing of its petition and demand), the Authority shall send a notice of decertification to ~~said~~ the Qualified Company and to the State Tax Commissioner. Decertification ~~to~~ of a Qualified Company may cause the forfeiture of any right or interest to further tax credits under the Act or these Rules (1) for the decertified company or (2) for any Applicant, or for any Qualified

Company seeking designation as qualified of a separate capital base or an increase in its capital base, in which any officer, general partner, managing partner, limited liability company member or manager or trustee, or investor served as of the decertified company is an officer, general partner, managing partner, limited liability company member or manager, or trustee of any decertified Qualified Company, or investor.

6.10. Voluntary Decertification Requested by Qualified Company.

A Qualified Company, which has complied with the provisions of the Act and these Rules including the provisions of W. Va. Code § Section 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 W. Va. Code § 5E-1-12(c) or Sections 7.1 through 7.4 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. The standard to be used by the Authority to determine compliance with W. Va. Code Section 5E-1-12(b) and Subsection 5.10.1 of these Rules, will be whether the Qualified Company has maintained for at least five years individual Qualified Investments totalling (1) at least sixty percent (60%) of the capital base from which such investments were made, with regard to the initial capital base of a Qualified Company designated as such, or any separate capital base or increase to capital base designated as qualified, prior to the 1991 amendments to the Act; or (2) at least seventy-five (75%) of the capital base from which such investments were made, with regard to the initial capital base of a Qualified Company designated as such, or any separate capital base or increase to capital base designated as qualified, subsequent to the 1991 amendments to the Act.

6.11. Audits.

In addition to the annual audit required under W. Va. Code Section 5E-1-16(a) and Section 6.1 of these Rules, the Authority and the Tax Commissioner may jointly audit any one or more Qualified Companies in any year on a random basis, or for cause, or for any other basis the Authority and Tax Commissioner may select. In addition to any other right or power the Tax Commissioner may have to audit any business in which a Qualified Company has invested or proposes to invest, the Tax Commissioner

may audit such a business on a random audit selection basis, or for cause, or on any other basis the Tax Commissioner may select.

Section 7: § 117-1-7. 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 W. Va. Code § 5E-1-12(b) to be violated. The standard to be applied by the Authority in determining whether dissolution or liquidation would cause such provisions to be violated is that set forth in Section 6.10 of these Rules.

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 ~~e~~Qualified ~~±~~Investments of the Qualified Company currently outstanding.

7.2.2. Information certifying that all ~~e~~Qualified ~~±~~Investments currently outstanding have been maintained or reinvested, pursuant to W. Va. Code § Section 5E-1-12(b) and Subsection 5.10.1 of these Rules, for a period of at least five (5) years; or, if all ~~e~~Qualified ~~±~~Investments current 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 Qualified Company's compliance with the Act and these Rules, including without limitation W. Va. Code § Section 5E-1-12(b) and Section 5.10.1 of these Rules.

Section 8: § 117-1-8. Ruling Procedure.

8.1. A Qualified Company or the organizers of a Qualified Company may request a an informal 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 of Tax and Revenue.

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, 1018 Kanawha Blvd., Suite 501, Charleston, WV 25301-2828.

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 person 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 Act, the regulations~~ these Rules 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: § 117-1-9. 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~~ along with W. Va. Code § Section 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 and Rules promulgated thereunder as ~~it~~ they appeared at the time the ~~Qualified Investment~~ was made. Funds repaid or returned to a Qualified Company and reinvested pursuant to W. Va. Code Section 5E-1-12(b) and Section 5.10.1 of these Rules subsequent to such 1991 amendments shall be governed by such 1991 amendments.

9.1.2. A Qualified Investment made pursuant to ~~Any~~ contract or agreement entered into prior to the effective date of the 1991 amendments to the Act by a Qualified Company whereby the Qualified Company agreed to make an investment or increase its investment in a West Virginia Business, with such investment or increase in investment to take place subsequent to the effective date of the 1991 amendments to the Act, shall remain unaffected by such 1991 amendments and shall be governed by the Act and Rules promulgated thereunder as ~~it~~ they 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 and Rules promulgated thereunder as ~~it~~ they 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: § 117-1-10. 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.

Gaston Caperton, Governor



WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY

1018 Kanawha Boulevard, East, Suite 501
Charleston, WV 25301-2827

Telephone (304) 558-3650
FAX (304) 558-0206

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

Re: Statement of Circumstances Necessitating Emergency Rules Pursuant to Chapter 5E, Article 1, Section 5 and Chapter 29A, Article 1, Section 2(d) of the Code of West Virginia, 1931 as amended.

Dear Secretary Hechler:

The purpose of this letter is to set-forth the circumstances which necessitate the adoption of the emergency rule, Title 117, Section 1. The West Virginia Economic Development Authority believes that the adoption of this emergency rule is necessary to prevent substantial harm to the public interest, as required by Chapter 29A, Article 3, Section 15 of the Code of West Virginia.

In 1986, the West Virginia Capital Company Act was enacted to encourage immediate investment in West Virginia businesses by making tax credits available to investors in Qualified West Virginia Capital Companies. The Act limits the total amount of tax credits which are available in any year. To receive tax credits, each Capital Company must submit an application to the West Virginia Economic Development Authority requesting that the Authority "certify" the company and designate the company as "qualified" within the meaning of the Act. Tax credits are then allocated to Qualified Capital Companies in the order the companies are certified and qualified, essentially a "first-come, first-served" basis.

Over the last several years, the demand for tax credits has exceeded the amount available. This problem has severely strained the current procedure for acceptance and review of applications for the credits. The "first-come, first-served" application process has created a competition between the applicants to be "first in line" on the morning of the first day applications are accepted. In each of the last two years, this process for receiving applications has resulted in civil actions against the Economic Development Authority, contesting its administration of the capital company program.

Following the allocation of tax credits in 1993, a petition seeking a writ of mandamus was brought against the Economic Development Authority by a qualified capital company which applied for tax credits. A copy of the Verified Petition for Writ of

The Honorable Ken Hechler
November 16, 1995
Page 2

Mandamus is attached hereto as "Exhibit 1." Specifically, the petition challenged the Authority's designation of the date on which it would accept applications from certain applicants. The mandamus proceeding was resolved in favor of the Authority.

Despite the Economic Development Authority's attempts to structure the application process to avoid further problems, a second petition for a writ of mandamus was brought against the Authority following the allocation of tax credits in 1994. A copy of the second Verified Petition for Writ of Mandamus is attached hereto as "Exhibit 2." The action was brought by an applicant which contested the Authority's acceptance of applications in the order the applicants had stationed themselves at the Authority's offices. The Authority's application acceptance process in that year was complicated by the fact that its offices had relocated to private facilities as to which the Authority had no control. The second action was resolved by settlement among various applicants.

The complaints in each of these actions centered specifically on the actual procedure for acceptance of the applications and the competition which the "first come, first served" procedure creates. The Economic Development Authority incurred significant legal fees defending these suits. Furthermore, significant administrative time and expense was also required of the Authority. The actual award of the tax credits was delayed on each occasion and, most importantly, the potential liability of the Authority in each civil action totalled millions of dollars.

Under the present legislative rules for accepting and reviewing applications for tax credits, the potential for problems similar to those that occurred in 1993 and 1994 is substantial. The Economic Development Authority will be forced to expend additional funds defending any suits which arise due to these concerns. Furthermore, the ability of the Economic Development Authority to settle such suits is extremely limited in so far as the total amount of tax credits which are available is established by the Legislature. Without the cooperation of parties who receive tax credit allocations, future settlements may not be possible, thus increasing not only the cost of defending any such suits but also the potential exposure to liability.

The Economic Development Authority believes that the adoption of this amendment to Title 117, Section 1 as an emergency rule is both permissible and necessary pursuant to Chapter 29A, Article 3, Section 15(f)(3) of the West Virginia Code. Specifically, the enactment of this emergency rule should prevent any future needless expenditure of public funds and remove the risk of further liability of the Economic Development Authority for the application process, thus preventing substantial harm to the public interest. Additionally, the proposed rule will ensure fair treatment to all applicants. The Economic

The Honorable Ken Hechler
November 16, 1995
Page 3

Development Authority is in the process of seeking Legislative approval of this rule and expects to hold a comment period on the rule in the next several weeks.

Thank you for your attention to this letter and review of this proposal. If you have any question regarding any aspect of this rule, please do not hesitate to call.

Very truly yours,

A handwritten signature in cursive script that reads "David Warner".

David Warner

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

94 JAN 26 PM 1:15

CLERK OF COURT
KANAWHA COUNTY, WEST VIRGINIA

FREDERICK L. HADDAD, FREDERICK L. HADDAD, JR., SUSAN L. HADDAD, KAREN WHITE HADDAD, PAUL WHITE, THOMAS E. POTTER, MICHAEL C. ELLIS, FRANK A. BAER, II, FRANK A. BAER, III, DOUGLAS COOK, WILLIAM ELLIS, JR. and TONI F. DeFADE,

Petitioners,

v.

Civil Action No. 94-Misc-40

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY, a statutory corporation, and DAVID A. WARNER, Director of the West Virginia Economic Development Authority,

Respondents.

JUDGE RANSON

VERIFIED PETITION FOR WRIT OF MANDAMUS

Nature of Action

Petitioners seek in this action a writ of mandamus against the respondents due to their failure and refusal to fulfill their mandatory, nondiscretionary duties under the West Virginia Capital Company Act, W. Va. Code § 5E-1-1, et seq. (the "Act"), and the legislative rules, C.S.R. § 117-1-2 (the "Rules"), promulgated pursuant to the Act. Petitioners allege in support of the relief requested that:

Parties

1. Petitioners each reside in Kanawha County, West Virginia, and for the purposes of this action were and are all of the partners in Haddad Ventura Capital Fund, a general partnership existing under the laws of the State of West Virginia.

2. Respondent West Virginia Economic Development Authority ("Authority") is "a body corporate and politic,



constituting a public corporation and government instrumentality" pursuant to W. Va. Code § 31-15-1, et seq.

3. Respondent David A. Warner ("Director") was at all material times and is the Director of the Authority, having been duly appointed to that office by the Authority pursuant to W. Va. Code § 31-15-6(p).

Jurisdiction

4. This Court has jurisdiction to grant the relief requested pursuant to Article 8, Section 6, of the Constitution of West Virginia and W. Va. Code § 53-1-2.

The Act and Rules

5. The Act provides (W. Va. Code § 5E-1-6(a)) that "[t]he [A]uthority shall qualify West Virginia capital companies commencing after [July 1, 1986]."

6. The Act further provides (W. Va. Code § 5E-1-8(b)) that, with respect to the year beginning July 1, 1993, and ending June 30, 1994 (the "1993-94 fiscal year"), "the [A]uthority shall, for the first one hundred eighty days of the fiscal year, accept applications only from companies who certify in their application that the investment of its entire capital base will be in one or more small business investment corporations organized under the small business investment act."

7. The Rules provide (C.S.R. § 117-1-2.6) that "[t]he Director shall record the time and date of filing of the application at the time the application is received in the Office of the [Authority]."

8. The Rules further provide (C.S.R. § 117-1-2.8, -2.9) that "[u]pon a determination by the Director that an application is complete, the Director shall place the complete application on the agenda of the next regularly scheduled meeting of the Authority" and that "[t]he Authority shall consider all applications in the order they are placed on the agenda of any regularly scheduled meeting of the Authority."

Facts

9. December 27, 1993, was the 180th day of the 1993-94 fiscal year.

10. On December 28, 1993, petitioners caused to be received at the Office of the Authority their Application for Qualification of a West Virginia Capital Company ("Application") pursuant to the Act. Upon information, the Application was the first such application received at the Office of the Authority after the first 180 days of the 1993-94 fiscal year and, in fact, the only such application received at the Office of the Authority on December 28, 1993.

11. Notwithstanding his ministerial, nondiscretionary duties provided in the Rules (C.S.R. § 117-1-2.6), the Director failed and refused to record the time and date of filing of the Application received in the Office of the Authority on December 28, 1993.

12. Despite petitioners' subsequent demand, the Director and other agents and representatives of the Authority have refused to so record the time and date of filing of the Application received in the Office of the Authority on December 28, 1993.

13. Notwithstanding receipt of the Application in the Office of the Authority on December 28, 1993, and without waiving any of their rights arising out of such receipt, petitioners again caused the Application to be received at the Office of the Authority at approximately 8:30 a.m. on December 29, 1993.

14. Upon information, although the Application was received in the Office of the Authority immediately upon opening of that Office at approximately 8:30 a.m. on December 29, 1993, the Director and other agents and representatives of the Authority have advised petitioners that the Application has been deemed by the Director to have been received after three other such applications received in the Office of the Authority at approximately 8:30 a.m. on December 29, 1993.

15. Upon information, the Director has determined the Application and the three applications described in paragraph 14, above, to be complete.

16. The next "regularly scheduled meeting of the Authority" as referred to in the Rules (C.S.R. § 117-1-2.8) will be held on February 17, 1994.

17. Upon information, the Director intends to place on the Authority's agenda for the February 17, 1994, meeting the three applications referred to in paragraph 14, above, ahead of the Application.

18. The Act limits (W. Va. Code § 5E-1-8) total credits authorized for all companies during the 1993-94 fiscal year to \$5,000,000.

19. Upon information, the credits available to those applicants whose applications were received during the first 180 days of the 1993-94 fiscal year, when added to the credits available to the three applicants described in paragraph 14, above, will exhaust the credits otherwise available to petitioners.

20. After credits for the 1993-94 fiscal year are authorized by the Authority, it will be difficult, if not impossible, for petitioners to obtain the relief requested. In addition, other applicants for whom the Authority erroneously authorizes credits may rely to their detriment upon such erroneous authorization.

Basis for Relief

21. The duties of the Authority and Director under the Act and Rules cited in paragraphs 5-8, above, are ministerial, nondiscretionary duties in the performance of which petitioners have an enforceable legal interest.

Relief


Petitioners seek:

1. A rule to show cause, scheduling this matter for hearing before February 17, 1994;
2. A writ of mandamus, directing the Authority and its Director to record the time and date of filing of the Application as of December 28, 1993, and to treat the Application as so filed for all purposes under the Act and Rules; and
3. An order directing the Authority and its Director to reimburse petitioners for all costs expended in this action,

including a reasonable attorney's fee, and for such other relief as this Court deems just.

FREDERICK L. HADDAD, FREDERICK L. HADDAD, JR., SUSAN L. HADDAD, KAREN WHITE HADDAD, PAUL WHITE, THOMAS E. POTTER, MICHAEL C. ELLIS, FRANK A. BAER, II, FRANK A. BAER, III, DOUGLAS COOK, WILLIAM ELLIS, JR. and TONI F. DeFADE

By Counsel


John Philip Malick
JACKSON & KELLY
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

ABDMF32

VERIFICATION

William M. Ellis, Jr., one of the petitioners named in the foregoing Petition, being duly sworn, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be on information, and that, insofar as they are therein stated to be on information, he believes them to be true.

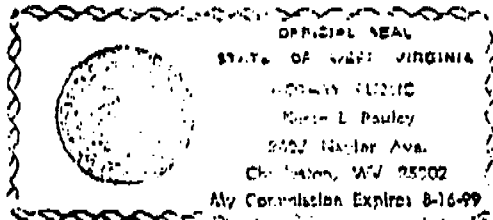
William M. Ellis, Jr.
Affiant

Taken, sworn to, and subscribed before me this 24 day of January, 1994.

My commission expires August 16, 1999.

Karen L. Pauley
Notary Public

ARNDP32



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FREDERICK L. HADDAD, FREDERICK L.
HADDAD, JR., SUSAN L. HADDAD,
KAREN WHITE HADDAD, PAUL WHITE,
THOMAS E. POTTER, MICHAEL C. ELLIS,
FRANK A. BAER, II, FRANK A. BAER, III,
DOUGLAS COOK, WILLIAM ELLIS, JR. and
TONI F. DeFADE,

Petitioners,

v.

Civil Action No. _____

WEST VIRGINIA ECONOMIC DEVELOPMENT
AUTHORITY, a statutory corporation,
and DAVID A. WARNER, Director
of the West Virginia Economic
Development Authority,

Respondents.

AFFIDAVIT OF CHARLES W. LOEB, JR.

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

On January 21, 1994, Charles W. Loeb, Jr., appeared before me, deposed and stated upon his oath:

1. My name is Charles W. Loeb, Jr.
2. At 8:30 a.m. on December 28, 1993, upon the opening of the offices of the West Virginia Economic Development Authority ("WVEDA"), I presented for filing, to a receptionist in the WVEDA offices, the Application for Qualification of a West Virginia Capital Company on behalf of Haddad Venture Capital Company (the "Application").
3. The WVEDA refused to accept the Application for filing.

FILED

.94 JAN 21 PM 1:45

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

4. To the best of my belief and information, no other Application for Qualification of a West Virginia Capital Company was presented for filing at the WVEDA offices on December 28, 1993, before the Application was presented for filing.

Charles W. Loeb, Jr
CHARLES W. LOEB, JR.

Taken, subscribed and sworn to before me this 31st day of January, 1994.
My commission expires: December 14, 1998

Sherry Lynn Abbott
Notary Public

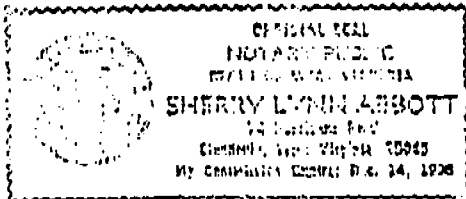


ABB04P01

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FREDERICK L. HADDAD,
FREDERICK L. HADDAD, JR.,
SUSAN L. HADDAD, THOMAS E. POTTER,
WILLIAM ELLIS, JR., and
LOUIS S. SOUTHWORTH, II, doing
business as HADDAD VENTURE CAPITAL
FUND, II, a West Virginia general
partnership,

Petitioners,

v.

CIVIL ACTION NO. 95 Misc 28

WEST VIRGINIA ECONOMIC DEVELOPMENT
AUTHORITY, a statutory corporation,
and DAVID A. WARNER, Director of
the West Virginia Economic
Development Authority,

Respondents.

VERIFIED PETITION FOR WRIT OF MANDAMUS

Nature of Action

Petitioners seek in this action a writ of mandamus against the respondents due to their failure and refusal to fulfill their mandatory, nondiscretionary duties under the West Virginia Capitol Company Act, W.Va. Code §5E-1-a, et seq. (the "Act"), and the legislature rules, C.S.R. §117-1-2 (the "Rules"), promulgated pursuant to the Act. Petitioners allege in support of the relief requested that:



Parties

1. Petitioner Haddad Venture Capital Fund, II, is a general partnership comprised of the individual petitioners. The individual petitioners each reside in Kanawha County, West Virginia, and for the purposes of this action were and are all of the partners in Haddad Venture Capital Fund, II, a general partnership existing under the law of the State of West Virginia.

2. Respondent West Virginia Economic Development Authority ("Authority") is "a body corporate and politic, constituting a public corporation and government instrumentality" pursuant to W.Va. Code §31-15-1, et seq.

3. Respondent David A. Warner ("Director") was at all material times and is the Director of the Authority, having been duly appointed to that office by the Authority pursuant to W.Va. Code §31-15-6(p).

Jurisdiction

4. This Court has jurisdiction to grant the relief requested pursuant to Article 8, Section 6, of the Constitution of West Virginia and W.Va. Code §53-1-2.

The Act and Rules

5. The Act provides (W.Va. Code §5E-1-6(a)) that "[t]he [A]uthority shall qualify West Virginia capital companies commencing after [July 1, 1986]."

6. The Act further provides (W.Va. Code §5E-1-8(b)) that, with respect to the year beginning July 1, 1993, and each fiscal year thereafter, "the [A]uthority shall, for the first one

hundred eighty days of the fiscal year, accept applications only from companies who certify in their application that the investment of its entire capital base will be in one or more small business investment corporations organized under the small business investment act."

7. The Rules provide (C.S.R. §117-1-2.6) that "[t]he Director shall record the time and date of filing of the application at the time the application is received in the Office of the [Authority]."

8. The Rules further provide (C.S.R. §117-1-2.8, -2.9) that "[u]pon a determination by the Director that an application is complete, the Director shall place the complete application on the agenda of the next regularly scheduled meeting of the Authority" and that "[t]he Authority shall consider all applications in the order they are placed on the agenda of any regularly scheduled meeting of the Authority."

9. The Authority posted at its main office and otherwise disseminated notices established the procedure for submitting application and for establishing the order in which applications would be received, true copies of which are attached hereto as Exhibits A and B.

Facts

10. Haddad Venture Capital Fund, II (the Haddad Fund), by its authorized representative (the "Haddad Representative") appeared at the North (Back) Door of the Boulevard Tower Building on Tuesday, December 27, 1994, with the completed application of

the Haddad Fund seeking to qualify as a venture capital company and qualify for \$750,000 in tax credits and assumed a position in the line of applicants which had formed.

11. Upon information and belief, at the time the Haddad Representative assumed his place in line, private security guards could be seen inside the commercial office building in which the Authority's offices are located, being the aforesaid Boulevard Tower Building, at a location other than the location designated in the notice of the Authority posing as security guards to the building.

12. Upon information and belief, the private security guards were hired by Massey Coal Co. and/or Massey Coal Capital Corp. and/or an affiliate thereof ("Massey") in an attempt to assure that the application to be filed by a Massey affiliated venture capital fund applicant (the "Massey Applicant") was designated as the first application received by the Authority and was accorded first priority consideration by the Authority.

13. Upon information and belief, a few hours before the time designated in the posted notice (Exhibit B) at which the Authority would accept applications at the Rear Door of the Boulevard Tower Building, one of the aforesaid security guards relinquished his purported role as a building security guard inside the said building and jumped ahead of the line of applicants, wrongfully assuming the first position in line outside the building over the protests of those already in line, including the Haddad Representative.

14. Upon information and belief, the representative of the Authority who appeared at the North (Back) Door of the Boulevard Tower Building at the designated time to received applications in behalf of the Authority was advised by the Haddad Representative and others of the facts set forth above and, notwithstanding the protest of the Haddad Representative, the application submitted in behalf of the Massey Applicant was accepted by the Authority's representative and designated as first in priority to be considered by the Authority.

15. The Authority has notified the designated representative of the Haddad Fund that the Authority has received applications for venture capital companies seeking tax credits in an amount in excess of the total amount of credits available and that, after calculating the credits applied for by those applicants whose applications were received prior to that of the Haddad Fund (including the Massey Applicant who, upon information, sought \$2,000,000 in tax credits), only \$395,000 in credits is available for the Haddad Fund, although the Haddad Fund applied for credits of \$750,000.

16. The Authority has refused to disclose the identity of applicants for venture capital fund tax credits, the specific amount of each application or the order in which such applications were received.

17. The Haddad Fund has made a written protest to the Authority setting forth the facts contained herein and has requested that the Massey Applicant be disqualified or that its

priority for consideration by the Authority be reduced to a position below that of the Haddad Fund, but the Authority appears to have no procedure to handle such protests and the Authority has been unwilling or unable to acknowledge its power and authority to grant the relief necessary to correct this situation.

18. The Authority is schedule to convene on Thursday, January 19, 1995, for the purpose of acting upon applications received by the Authority's representative and has evidenced its intent to consider all applications received in the order of priority assigned by the Authority's representative who accepted the applications and it is believed that the Massey Application will be considered first and that only \$395,000 in credits will be available for the Haddad Fund, rather than the \$750,000 in credits for which application was made.

Basis for Relief

19. The Authority has a mandatory duty to assure fair and equitable treatment of all applicants for venture capital fund tax credits and to assure that all applicants follow the rules, regulations and procedures established by the Authority which is a ministerial, nondiscretionary duty in the performance of which petitioners have an enforceable legal interest.

20. The duty of the Authority to consider applications for venture capital fund tax credits on a "first come - first served" in the order submitted by those applicants who have made such submission in accordance with the rules, regulations and procedures established by the Authority is a ministerial,

nondiscretionary duty in the performance of which petitioners have an enforceable legal interest.

21. Upon information and believe, the Massey Applicant wrongfully obtained priority for the application he submitted by wrongfully and unlawfully securing the first place in line at the time and place designated for the acceptance of applications for venture capital companies.

22. Petitioners will be irreparably damaged by the reduction of the tax credits made available to them by reason of the Authority's acquiescence in according the application filed by the Massey Applicant first priority.

23. Petitioners have a clear legal right to the relief requested.

Relief

Petitioners seek:


1. A rule to show cause, scheduling this matter for hearing prior to the meeting at which the Authority is scheduled to qualify the applicants for venture capital fund tax credits, which meeting is scheduled for January 19, 1995;

2. A writ of mandamus directing the Authority and its Director to disqualify the Massey Application for the reasons set forth herein or to reassign the priority for consideration of applications by the Authority so that the Haddad Fund application would be considered prior to the Massey Applicant's application;

3. An order directing the Authority and its Director to reimburse petitioners for all costs expended in this action including reasonable attorney's fees; and

4. Such other relief as this Court deems just.

FREDERICK L. HADDAD,
FREDERICK L. HADDAD, JR.,
SUSAN L. HADDAD,
THOMAS E. POTTER,
WILLIAM ELLIS, JR., and
LOUIS S. SOUTHWORTH, II, doing
business as HADDAD VENTURE
CAPITAL FUND, II, a West
Virginia general partnership,
By Counsel



William W. Booker
John R. Hoblitzell
KAY, CASTO, CHANEY, LOVE & WISE
P. O. Box 2031
Charleston, West Virginia 25327
(304) 345-8900

VENTURE CAPITAL TAX CREDITS

Applications will be accepted at the office of the West Virginia Economic Development Authority at Suite 501, 1018 Kanawha Boulevard (the "Boulevard Tower"), Charleston, West Virginia, beginning at the opening of business at 8:30 a.m. on December 28, 1994.

IMPORTANT INFORMATION

Access to the Boulevard Tower is restricted during non-business hours. No unauthorized person is allowed inside the building between the hours of 6:30 p.m. and 7:30 a.m. Monday through Friday.

Any applicant wishing to appear at the Boulevard Tower prior to 7:30 a.m. on December 28 should wait outside the north (rear) door of the building. Maintenance personnel will unlock the building at 7:30 a.m.

No non-employee will be permitted access to the Authority offices prior to 8:30 a.m. December 28 for the purpose of submitting a venture capital application. Any person having gained access to the building after 7:30 a.m. should wait in the elevator lobby on the fifth floor until access to the Authority office is granted at 8:30.

There are NO PUBLIC FACILITIES in the Boulevard Tower. Access to rest rooms is available only to individuals who work in the building.

Commencing with the opening of business at 8:30 a.m. on December 28, 1994, the Authority will receive applications in the order submitted, and will record the time and date of filing accordingly and mark the order of receipt of applications. Applications will be reviewed for completeness in the order received and, if determined to be complete or substantially complete, will be placed for consideration on the agenda of the next meeting of the Authority's Board in the order of receipt. Any and all available tax credits will be allocated to investors in qualified companies in the order that the applications of such capital companies are considered by the Authority and deemed qualified. Upon allocation of any and all available tax credits, remaining applications will not be considered by the Authority.

Any questions concerning this matter should be directed to Randy L. Eldridge, Deputy Director, West Virginia Economic Development Authority, at (304) 558-3650.

PLEASE LEAVE THIS NOTICE POSTED UNTIL DECEMBER 29

EXHIBIT A

REVISION TO NOTICE ON WEST VIRGINIA VENTURE CAPITAL CREDIT
APPLICATIONS

APPLICATIONS FOR VENTURE CAPITAL TAX CREDITS WILL BE RECEIVED AT
THE NORTH (BACK) DOOR OF THE BOULEVARD TOWER BUILDING AT 8:30 A.M.
WEDNESDAY, DECEMBER 28.

ONLY THOSE PARTIES IN LINE AT THAT DOOR AT THAT TIME WILL BE
CONSIDERED IN LINE FOR THE ACCEPTANCE OF THEIR APPLICATION.

THIS NOTICE SUPERCEDES ANY NOTICES POSTED PRIOR TO DECEMBER 27,
1994 REGARDING THIS MATTER.

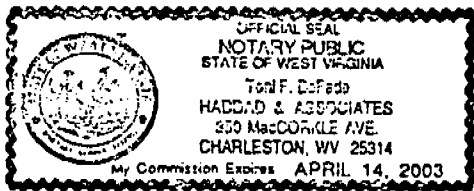
VERIFICATION

Frederick L (Fred) Haddad, one of the petitioners named in the foregoing VERIFIED PETITION FOR WRIT OF MANDAMUS, being duly sworn, says that the facts and allegations therein are true, except insofar as they are therein stated to be on information, and that, insofar as they are therein stated to be on information, he believes them to be true.

Fred Haddad
Affiant

Taken, subscribed and sworn to before me this 13 day of January, 1995.

My commission expires: April 14, 2003



Tom F. DeFede
Notary Public



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

RE: Consent to filing of Agency Adopted Emergency Rule

Dear Secretary Hechler:

Pursuant to West Virginia Code § 5F-2-2(a)(12), the undersigned hereby grants consent to the filing of the following emergency rule which has been adopted by the West Virginia Economic Development Authority: Title 117, Series 1, titled "General Administration of the West Virginia Capital Company Act: Establishment of the Application Procedures to Implement the Act."

Signed this 16th day of November, 1995.

A handwritten signature in cursive script, reading "Thomas C. Burns".

Thomas C. Burns
Executive Director of the West Virginia
Development Office

DATE: NOVEMBER 16, 1995

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY

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

1. Date of Filing November 16, 1995
2. Statutory authority for promulgating emergency rule:
W.Va. Code §§ 29A-1-2(d) and 5E-1-5
3. Date of filing of proposed legislative rule: November 21, 1995
4. Does the emergency rule adopt new language or does it amend appeal a current legislative rule?
The emergency rules amend current legislative rules
5. Has the same or similar emergency rule previously been filed and expired?
No
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.
See response to number 8 below. Additionally, the procedure for acceptance of applications necessitated under the current rules holds potential for disturbances of the peace and/or violence.
7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.
Not applicable

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

The existing rules are imprecise and unclear, resulting in legal challenges in recent years to the Authority's administration of the capital company program, thus unnecessarily causing expenditure of state funds. Such suits subject the Authority to potential multi-million dollar liabilities. Additionally, the existing rules, and their application, may result in inequitable treatment of certain applicants and the West Virginia businesses to be invested in by such applicants.

West Virginia Economic Development Authority
Legislative Rule
Title 117, Series 1

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY

Title 117, Series 1

BRIEF SUMMARY OF RULE

The purpose of this emergency rule is to amend and clarify provisions of the existing legislative rules pertaining to (1) the Authority's acceptance of applications for designation as qualified of capital companies, separate capital bases, and increases to capital bases; (2) the Authority's review of such applications; (3) the Authority's designation as qualified of capital companies, separate capital bases, and increases to capital bases; and (4) the Authority's allocation of tax credits available under the Capital Company Act, West Virginia Code Section 5E-1-8, to companies or capital bases so designated.

The emergency rule delineates the procedures to be followed by applicants and the Authority relative to such processes, specifically addressing separate capital bases and increases to capital bases, the certification and qualification processes, simultaneously received applications, and applications of applicants certifying that their funds will be invested in small business investment corporations. The emergency rule further clarifies investment requirements of qualified companies investing in small business investment corporations. The rule also clarifies certain procedural and technical aspects of the Capital Company Act and its tax credit program.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

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

Type of Rule: XX Legislative _____ Interpretive _____ Procedural

Agency: West Virginia Economic Development Authority

Address: 1018 Kanawha Boulevard, East, Suite 501
Charleston, West Virginia

=====

1. **Effect of Proposed Rule:** See #2.

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST					
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. **Explanation of above estimates:**

The proposed rules are expected to have no negative fiscal impact. While impossible to quantify, the proposed rules should result in fiscal savings due to diminished litigation expenses, decreased exposure to legal liability and increased efficiency as set forth below.

3. Objectives of these rules:

The proposed emergency rules are intended to provide clear and precise processes for the Economic Development Authority's acceptance and review of applications seeking designation as qualified of capital companies, separate capital bases and increases to capital bases, for the Authority's designation of such, and for its allocation of tax credits available under W.Va. Code Section 5E-1-8 to companies and capital bases so designated as qualified. The existing rules have proven to be imprecise and ambiguous. Application of the existing rules in prior years has resulted in costly legal actions against the Authority regarding its administration of the capital company program. The proposed emergency rules should substantially decrease the likelihood of future legal actions, diminish the possibility of legal liability and significantly increase the efficiency of the Authority in administering the program and of applicants seeking to utilize the program.

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

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

The implementation of these emergency rules will permit the prompt and efficient allocation of tax credits available to Qualified West Virginia Capital Companies and significantly decrease the likelihood of the Authority being subjected to future lawsuits as a result of its administration of the program.

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

The Authority's prompt and efficient administration of the capital company program, and clear and precise rules pertaining to the program will benefit capital companies by decreasing the costs of ascertaining requirements for program participation and ensuring fair treatment of all participants. Moreover, West Virginia businesses will benefit from additional investments by capital companies resulting from increased participation in the program and decreased costs.

C. Economic Impact on Citizens/Public at Large.

Implementation of these emergency rules will save taxpayer's dollars heretofore expended on defending legal actions challenging the Authority's administration of the program and further expended on determining appropriate procedures to be followed by the Authority. In addition, the citizens of West Virginia will benefit from job growth and economic

development stimulated by increased capital company investment in West Virginia businesses.

Date: November 16, 1995

Signature of Agency Head or Authorized Representative

David A. Warner

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

STEPHEN N. REED
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 558-6000
Corporations: (304) 558-8000
FAX: (304) 558-0900



STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

December 22, 1995

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

PENNEY BARKER
Supervisor, Corporations

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

(Plus all the volunteer
help we can get)

DEC 22 8 43 AM '95

FILED

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

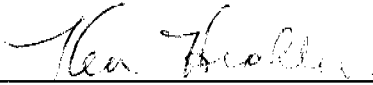
AGENCY: West Virginia Economic Development Authority

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

DATE FILED AS AN EMERGENCY RULE: November 16, 1995

DECISION NO. 15-95

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



KEN HECHLER
Secretary of State

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

STEPHEN N. REED
Deputy Secretary of State

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WILLIAM H. HARRINGTON
Chief of Staff

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SECRETARY OF STATE

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1900 Kanawha Blvd., East
Charleston, WV 25305-0770

(Plus all the volunteer
help we can get)

EMERGENCY RULE DECISION (ERD 15-95)

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

FILED AS AN EMERGENCY RULE: November 16, 1995

- par. 1 The West Virginia Economic Development Authority (Authority) has filed the above amendments to an existing emergency rule.
- par. 2 West Virginia Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [(29A-3-15a(b))].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the thirty-five day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Authority filed this emergency rule with supporting documents with the Secretary of State November 16, 1995 and with the LRMRC November 16, 1995.

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

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

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

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

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

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

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

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

The existing Legislative Rules are imprecise, unclear and ambiguous with regard to the Authority's acceptance of applications (for designation of venture capital companies as "Qualified Companies," whose investors are thus entitled to tax credits under the Capital Company Act), its review of such applications, and its process for designation of applications as qualified. Such imprecision, lack of clarity and ambiguity have resulted in the Authority being subjected to legal actions, in the form of mandamus proceedings, in each of the preceding 2 fiscal years relative to its application acceptance procedures. In defending such actions, the Authority has been forced to expend a substantial portion of its annual capital company legal budget. Moreover, such suits expose the Authority to potential liability of millions of dollars. Additionally, the pendency of the legal actions has forced the Authority to freeze the administration of the capital company program, thus delaying the participation in the program of entities lawfully entitled to so participate as well as delaying those entities' infusion of capital into West Virginia's economy.

The existing rules fail to provide adequate guidance to either the Authority or capital company program participants. Lack of guidance may result in deprivation of participants' rights, whether due to the Authority's misapplication or misinterpretation of the rules, or participants' mistakes or inaction due to confusion. Additionally, continued challenges to the Authority's administration of the program is likely to undermine confidence of participants and the public in the Authority, as well as in state government as a whole.

Amendments to the Capital Company Act in 1993 have not been reflected in legislative rules. Those amendments directly pertain to the application process and have exacerbated the inadequacy of the existing rules.

The proposed emergency rules are intended to provide a precise and clear mechanism for the Authority's acceptance and review of applications, and its allocation of tax credits directly therefrom.

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

par. 14 This decision shall be cited as Emergency Rule Decision 15-95 or ERD 15-95 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Economic Development Authority, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER
Secretary of State

Entered _____

FILED

DEC 22 8 43 AM '95

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE