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TITLE 117
EMERGENCY RULE
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY

SECRETARY OF STATE

SERIES 3
GENERAL ADMINISTRATION OF THE
WEST VIRGINIA VENTURE CAPITAL ACT

§117-3-1. General.

1.1. Scope. -- This Legislative Rule is promulgated to provide for the general administration of the West Virginia Venture Capital Act. This Rule provides necessary clarification of the provisions of the Act and provides for the general administration of the Act.

1.2. Authority. -- W. Va. Code §5E-2-3.

1.3. Filing Date. -- April 15, 2004.

1.4. Effective Date. -- April 15, 2004.

1.5. Citation. -- This Legislative Rule may be cited as 117 C.S.R., Series 3, §117-3-1, et seq.

§117-3-2. Definitions.

2.1. "Act" means the West Virginia Venture Capital Act, W. Va. Code §5E-2-1 et seq.

2.2. "Authority" means the West Virginia Economic Development Authority, provided for in W. Va. Code §31-15-1 et seq.

2.3. "Authorized Tax Credits" means the tax credits provided for in W. Va. Code §5E-2-4.

2.4. "Debt" means a loan to be repaid pursuant to a loan instrument, and includes debt convertible into equity.

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

2.6. "Entity" means a corporation, Partnership, limited liability company, trust or other business organization.

2.7. "Equity" means common stock or preferred stock in a corporation including warrants and options which upon exercise entitle the purchaser to common or preferred stock. Equity also means an ownership interest in other Entities.

2.8. "Federal Program Participant" means (a) An SBIC; (b) a New Markets Venture Capital Company; or (c) an Entity which is not an SBIC or a New Markets Venture Capital Company but which is designated by the Authority as a Federal Program Participant due to the Entity's participation in a venture capital program administered by the United States Small Business Administration or other federal agency.

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

2.10. "Fund" means one (1) or more Entities authorized by the Authority pursuant to the Act for the investment of capital in the West Virginia economy. A Federal Program Participant, as defined in Subsection 2.8 of this Rule, may serve as a Fund, Fund Manager or in a dual capacity. A Federal Program Participant that serves as a Fund, Fund Manager, or in a dual capacity, is subject to all the requirements set forth in this Rule applicable to Funds and Fund Managers.

2.11. "Fund Manager" means an individual, Federal Program Participant or Entity selected pursuant to Section 4 of this Rule to manage the assets of a Fund or a Fund Share.

2.12. "Fund Share" means a segregated portion of the assets of a Fund.

2.13. "Governance Agreement" means the agreement entered into by a Governing Entity and the investors for the management of the affairs of a Fund.

2.14. "Governing Entity" means the Entity or Entities which have the authority to control the business and affairs of a Fund.

2.15. "Investor" means an individual or Entity which has invested in a Fund or a Fund Share.

2.16. "Managing Body" means the board of directors in the case of a corporation, 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.

2.17. "New Markets Venture Capital Company" means an Entity which has been designated by the United States Small Business Administration as a New Markets Venture Capital Company pursuant to 13 C.F.R. §108 et seq.

2.18. "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 the syndicate, group, pool, joint venture or organization. The term "Partnership" includes a general or limited partnership.

2.19. "Participation Agreement" means a written agreement executed by a Fund Manager and the applicable Fund or Governing Entity, as the case may require, setting forth the terms and conditions of the Fund Manager's service to the Fund or Fund Share. In instances where the Fund or Fund Share purchases an ownership interest in its Fund Manager, "participation agreement" may, as applicable, include the limited partnership agreement, limited liability company operating agreement or other applicable written agreement entered into by the Fund and other owners of the Fund Manager.

2.20. "Pass-Through Entity" means any person, other than an individual, which is not classified for federal income tax purposes as an association taxed as a corporation.

2.21. "Person" includes an individual or Entity.

2.22. "SBIC" or "Small Business Investment Company" means only an Entity which is licensed by the United States Small Business Administration as a Small Business Investment Company under the Small Business Investment Act of 1958, 15 U.S.C. §§ 661 et seq., as amended.

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2.23. "S Corporation" or "Subchapter S Corporation" means a small business corporation as defined in Section 1361(b) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 1 et seq., as amended, for which an election under Section 1362(a) of the Code is in effect.

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

2.25. "West Virginia Business" means an Entity which, at all times in which monies from the Fund are invested in the Entity unless otherwise agreed to by the Governing Entity, 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 means more than fifty percent (50%) of the gross revenues of a business.

§117-3-3. Purpose and Structure.

3.1. Purpose. - - The Act creates a tax credit program whereby investors receive a tax credit by making an investment in a fund authorized by the Authority for the investment of capital in the West Virginia economy. Each fund shall be independently operated by qualified managers and shall not be directly or indirectly operated or managed by the investors. Each Fund shall be an Entity authorized by the Authority for the purpose of receiving investments from investors desiring a tax credit and thereafter, through the use of Fund Managers, making investments in West Virginia Businesses.

3.2. Funds; Fund Shares. - - During each State fiscal year in which tax credits are authorized for allocation under the Act, the Authority shall create one or more Funds for the receipt of investments from individuals and entities meeting certain requirements (as set forth in Section 5 of this Rule) and which desire to invest and to receive a tax credit allocated by the Authority. The creation of each Fund and the characteristics of the Fund, including for example its structure, the type of Fund Shares if any within the Fund, the Fund Managers and the type of investments anticipated to be made, shall be communicated by the Governing Entity or the Authority to those individuals and entities which, in accordance with Subdivision 5.1.b of this Rule, have evidenced to the Authority that he, she or it meets the minimum requirements for investors set forth in Subdivision 5.1.a of this Rule and desire to consider investment in the Fund.

§117-3-4. Fund Managers.

4.1. Application. -- Any individual or Entity, including, without limitation, a Federal Program Participant, desiring to apply for designation by the Authority as a Fund Manager shall submit a written application on forms provided by the Authority or, in the discretion of the Authority, shall submit a written proposal to the Authority in response to a request for proposal issued by the Authority.

4.1.1. Contents of Application or Proposal. -- The application or proposal shall be signed and verified by the applicant or by a duly authorized representative of the applicant, and shall contain the following information:

4.1.1.a. The full legal name and tax identification number of the applicant;

4.1.1.b. 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;

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4.1.1.c. A certified copy, as applicable, of the applicant's: Articles of Incorporation; certificate of formation of a limited partnership; Articles of Organization of a limited liability company; documents that evidence the creation of a trust; or any other evidence that the Applicant is organized and existing as an Entity;

4.1.1.d. Unless otherwise directed by the Authority, the titles, names, home and business addresses, telephone numbers and tax identification numbers of, as applicable, the applicant's directors, officers, shareholders, partners, members, managers, trustees or other persons or Entities serving on the Managing Body of, or having an ownership interest in, the applicant. The addresses shall include street and number, city or town, state and zip code;

4.1.1.e. Information evidencing that the applicant has met all minimum requirements for Fund Managers as set forth in Subsection 4.2 of this Rule;

4.1.1.f. A statement that the Applicant, if designated as a Fund Manager, will comply with all requirements of the Act and this Rule;

4.1.1.g. The procedure by which the Applicant, if designated as a Fund Manager, would insure compliance with Subsection 7.4 of this Rule; and

4.1.1.h. Any and all additional information requested by the Authority.

4.1.2. Application Forms and Requests for Proposals. -- The form for applying to become a Fund Manager or a request for proposal may be obtained from the Director at the following address: West Virginia Economic Development Authority, NorthGate Business Park, 160 Association Drive, Charleston, WV 25311-1217.

4.1.3. Filing. -- Each Applicant shall file with the Director three (3) complete applications or proposals with original signatures.

4.1.4. Receipt. -- The Director shall only receive applications or proposals at the times set forth by the Director in notices published in the State Register.

4.2. Minimum Requirements of Fund Managers. -- The following requirements apply as indicated to all Fund Managers and applicants for Fund Manager:

4.2.a. Business Office. -- A Fund Manager or applicant for Fund Manager, prior to the execution of a participation or other agreement with the Fund or Governing Entity of the Fund in accordance with Subsection 4.4 of this Rule, shall have a business office located within the State of West Virginia. The office shall have a listed telephone number and shall be open to the public during normal business hours;

4.2.b. Net Worth. -- A Fund Manager or applicant for Fund Manager shall have a minimum net worth, as evidenced by financial statements submitted to the Authority, in such an amount as is acceptable to the Authority;

4.2.c. Experience. -- A Fund Manager or applicant for Fund Manager shall have investment experience acceptable to the Authority;

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4.2.d. Business Registration Certificate. -- A Fund Manager or applicant for Fund Manager shall hold a valid West Virginia business registration certificate pursuant to W. Va. Code §11-12-1 et seq., or be exempt from registration.

4.3. Review of Applications and Proposals. -- The Authority shall review all applications and proposals properly and timely submitted to the Director.

4.4. Designation of Fund Managers; Execution of Participation Agreements. The Authority, in its discretion, shall select from the applications or proposals properly and timely submitted to the Director one (1) Fund Manager for each Fund or Fund Share. The Authority shall not designate any individual or Entity as a Fund Manager until a participation or other agreement has been executed between the applicant and the Fund or Governing Entity of the applicable Fund evidencing the designation of the applicant as a Fund Manager and setting forth terms and conditions that are acceptable to the Authority and the applicant including, without limitation, provisions setting forth:

4.4.1. The Fund Manager's compensation; and

4.4.2. All other terms that are agreed to by the Governing Entity and the Fund Manager.

§117-3-5. Investors.

5.1. Minimum Requirements of Investors; Confirmation.

5.1.a. Minimum Requirements. -- All investors in any Fund or Fund Share, and any individual or Entity applying for a tax credit under this Rule, shall meet the following requirements:

5.1.a.1. Accredited Investor. Each investor shall meet the requirements to be an accredited investor as set forth, from time to time, in Regulation D promulgated by the U.S. Securities and Exchange Commission under the Securities Act of 1933 or shall meet any other more stringent requirements as may be designated, from time to time, by the Authority; and

5.1.a.2. Minimum Investment. Each investor shall invest in a Fund, or as an allocation amongst Fund Shares of a Fund, a minimum of Two Hundred Thousand Dollars (\$200,000.00) or other amount set by the Authority.

5.1.b. Confirmation. -- During the times specified by the Authority, individuals and entities meeting the minimum requirements of investors as set forth in Subdivision 5.1.a of this Rule and desiring to consider investment in a Fund or Fund Share shall submit evidence to the Authority, in a form acceptable to the Authority, so that the Authority can confirm that the individual or Entity does meet the minimum requirements for investors set forth in Subdivision 5.1.a of this Rule. Only after confirmation has been made by the Authority may the individual or Entity apply for investment in any Fund or Fund Share and for receipt of any tax credits authorized under the Act.

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5.2.a. -- Announcement. The Authority shall announce, to all individuals and entities which in accordance with Subdivision 5.1.b of this Rule have been confirmed by the Authority to meet the minimum requirements of investors as set forth in Subdivision 5.1.a of this Rule, the acceptance of applications for investment in a Fund or Fund Share. The announcement shall occur at least thirty (30) calendar days before the date set for acceptance of applications. The notice shall set forth:

5.2.a.1. The first day upon which applications may be submitted to the Director;

5.2.a.2. The name of the Fund or Fund Share for which applications will be taken;

5.2.a.3. Information disclosing the Fund Managers for the Fund or Fund Share and other information pertaining to the Fund or Fund Share as desired by the Authority; and

5.2.a.4. Any other information desired by the Authority.

5.2.b. -- Application. Individuals and entities desiring to invest in a Fund or Fund Share shall submit to the Director a written application on forms provided by the Authority.

5.2.c. -- Contents of Application. The application shall be signed and verified by the applicant or by a duly authorized representative of the applicant, and shall contain the following:

5.2.c.1. The full legal name and tax identification number of the applicant;

5.2.c.2. The applicant's physical address, mailing address and telephone number;

5.2.c.3. If the applicant is a business Entity, the titles, names, home and business addresses and telephone numbers of, as applicable, the individuals and entities serving on the Managing Body of, or having an ownership interest in, the applicant. The addresses shall include street and number, city or town, state and zip code;

5.2.c.4. Information evidencing that the applicant continues to satisfy all minimum requirements for investors as set forth in Subdivision 5.1.a of this Rule;

5.2.c.5. A statement that the Applicant, if accepted as an investor, will comply with all requirements of the Act, this Rule and the applicable Governance Agreement;

5.2.c.6. A statement that the Applicant understands the risks and restrictions of investing in the applicable Fund and the applicable Fund Share;

5.2.c.7. A statement as to the percentage, which shall not exceed fifty percent of the amount of the applicant's investment, which the applicant agrees to receive as a tax credit under the Act if the applicant is accepted as an investor; provided, that the percentage shall not exceed ten percent in the case of qualified capital companies under the West Virginia Capital Company Act, W. Va. Code §5E-1-1 et seq., which have received the consent of the Authority to submit an application for investment in a Fund or Fund Share of monies from their capital bases which are not required to be invested in qualified investments;

5.2.c.8. A statement that, to the best knowledge of the investor, investment in the Fund or Fund Share applied for will not violate the provisions of Subsection 5.11 of this Rule;

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5.2.c.9. An irrevocable letter of credit representing the proposed investment in an amount equal to or exceeding the minimum investment amount as determined in accordance with Paragraph 5.1.a.2 of this Rule and a certified check for any initial capital call: Provided, that the economic development authority may authorize a reduction in the amount of the irrevocable letter of credit to correspond to a payment made towards the proposed investment; and

5.2.c.10. Any and all additional information or statements as requested by the Authority.

5.2.d. Application Forms. -- The form for applying to become an investor in a Fund or Fund Share may be obtained from the Director at the following address: West Virginia Economic Development Authority, NorthGate Business Park, 160 Association Drive, Charleston, WV 25311-1217.

5.2.e. Filing. -- Each Applicant shall file with the Director three (3) complete applications with original signatures.

5.2.f. Applications of Qualified Capital Companies. -- Qualified capital companies under the West Virginia Capital Company Act, W. Va. Code §5E-1-1 et seq. must receive the prior written consent of the Authority in order to submit an application for investment in a Fund or Fund Share. Any investment, if made, may only constitute in whole or in part monies from their capital bases which are not required to be invested in qualified investments. The application process and the requirements of investors set forth in this Rule also apply to qualified capital companies.

5.3. Application Receipt and Review.

5.3.a. Acceptance in General. -- During regular business hours of the Authority, applications shall be received by the Director (which shall for purposes of receipt of applications include other representatives of the Authority) on a first come, first served basis beginning on the day set forth in the announcement for acceptance of applications; provided, however, that all applications received by the Director on the same calendar day shall be considered simultaneously received regardless of the time of day of actual delivery. The Director shall record the time and date of receipt of an application. The Director shall not receive applications prior to the day set forth in the announcement for acceptance of applications

5.3.b. Delivery. -- Applications shall be considered received by the Director and submitted by the applicant on the day of actual delivery to the Director, whether the delivery is performed in person, by mail, by courier or delivery service, or otherwise.

5.3.c. Review of Applications.

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1. General Rule. -- The Director shall review all applications in the order of their receipt to determine if each application is complete. The Director has sole discretion to determine whether an application is complete. The Director's 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 that determination and shall return the incomplete application to the applicant. The applicant may resubmit the application after correcting the deficiencies stated in the notice. If an application, though incomplete, is substantially complete as determined in the sole discretion of the Director, the time of receipt of the resubmitted application, for purposes of review by the Director, shall be considered to be the time of receipt of the initial application. If an application is not substantially complete as determined in the sole discretion of the Director, the resubmitted application shall be considered received, for purposes of review by the Director, when resubmitted.

2. Review of Simultaneously Received Applications. -- a. In the event of simultaneously received applications submitted by applicants, the Director shall first review the 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 are less than the tax credits authorized for the Fund or Fund Share, after taking into account applications reviewed previously and determined to be complete or substantially complete, the Director shall proceed to review the simultaneously received applications for completeness and the applications shall be considered simultaneously reviewed.

b. If the total tax credits sought by all the simultaneously received applications exceed the tax credits authorized for the Fund or Fund Share, after taking into account applications reviewed previously and determined to be complete or substantially complete, the Director shall issue tax credits by giving preference to those applicants which have agreed in their application to accept a tax credit based on a lower percentage of their investment than that requested by the other applicants.

c. If authorized tax credits still remain after giving that preference, then the Director shall, within thirty (30) days, but not earlier than five (5) days, after the receipt of the applications, conduct a lottery to determine the order of review of the simultaneously received applications which have not been awarded tax credits based upon the preference of Paragraph b of this Subdivision, as follows:

i. The Director shall provide all applicants that submitted simultaneously received applications and which have not been awarded tax credits based upon the preference of Paragraph b of this Subdivision written notice of the lottery and the opportunity for their designated representative to attend the lottery.

ii. To conduct the lottery, the Director shall: (a) prepare for each applicant, 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; (b) deposit in a container one index card for each applicant; (c) select and draw from the container one index card in a manner that the Director may not determine the applicant set forth on the index card; (d) announce and record the applicant whose index card was drawn and the amount of tax credits sought by that applicant; and (e) repeat steps (c) and (d) until all applicants' cards are drawn from the container.

iii. Each application shall be then reviewed for completeness by the Director in the order in which it was drawn from the container.

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iv. Prior to commencement of the lottery process, all applicants participating in the lottery may, by written agreement in a form acceptable to the Authority, agree as to how the remaining tax credits are to be divided amongst the applicants; provided, however, that the minimum investment requirements set forth in Paragraph 5.1.a.2 of this Rule shall be satisfied.

v. If for any reason an applicant selected for a tax credit allocation does not become an investor, the Authority shall award the unused credit to the next qualified applicant.

5.4. False Information. -- Upon the submittal of any false or misleading information by an applicant, the Director may reject the application and deny further consideration of the applicant for qualification in that and subsequent fiscal years.

5.5. 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 duly or regularly scheduled meeting of the Authority. Complete applications shall be placed on the agenda in the order of their review by the Director.

5.6. Action of Authority. -- The Authority shall consider all applications in the order they are placed on the agenda of any duly or regularly scheduled meeting of the Authority.

5.7. Allocation of Tax Credits. -- In the order set forth in this Section, the Authority shall issue certificates of tax credit to the applicants for each Fund or Fund Share after each applicant has executed the applicable Governance Agreement and any other documentation requested by the Authority and the applicable Governing Entity. Upon issuance of tax credits to an applicant, the applicant becomes an investor in the Fund or Fund Share.

5.8. Notification of Action. -- The Director shall notify each applicant in writing of the Authority's action with regard to the application.

5.9. Suspension of Qualification Process. -- In any fiscal year, upon the allocation to applicants of the total tax credits authorized for that Fund or Fund Share, the Authority shall suspend the qualification process and the Director shall reject all subsequently submitted applications.

5.10. Obligation to Update Application. -- Any applicant shall immediately notify the Director in writing of any changes in any of the information filed with the Authority as part of an application filed under this Rule or any other information submitted to the Authority pursuant to this Rule.

5.11. Relationship with Fund Manager Prohibited.

5.11.1. General Rule. -- W. Va. Code §5E-2-4(b) provides for the issuance of tax credits to investors which invest in a fund authorized by the Authority which is independently operated by qualified managers and is not directly or indirectly operated by the investors.

5.11.2. Ownership. -- At all times during investment in a Fund or Fund Share, an investor in a Fund or Fund Share shall not have a substantial ownership interest, which for purposes of this Rule shall be considered a five percent or more ownership interest, in the Fund Manager managing the Fund or Fund Share invested in. Likewise, a Fund Manager shall not have a substantial ownership interest, which for purposes of this Rule shall be considered a five percent or more ownership interest, in any investor of the Fund or Fund Share which the Fund Manager is managing.

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5.11.3. Compensation. -- Unless the prior written consent of the applicable Governing Entity is obtained, an investor in a Fund or Fund Share and the Manager of a Fund or Fund Share shall not have a direct or indirect compensation arrangement of any kind for services to be provided by the investor to the Fund Manager or by the Fund Manager to the investor, or any kind of debtor-creditor relationship.

5.12. Rights and Obligations of Investors. -- The rights and responsibilities of the investors in a Fund or Fund Share are those set forth in the Act, this Rule and the applicable Governance Agreement.

§117-3-6. Tax Credits.

6.1. Maximum Authorized Credits.

6.1.1. Generally. -- Each investor in a Fund or Fund Share shall be allowed a tax credit equal to no more than fifty percent of the investor's investment in a Fund or Fund Share; provided, that investors in a Fund or Fund Share which are qualified capital companies under the West Virginia Capital Company Act, W. Va. Code §5E-1-1 et seq., and which have, pursuant to the consent of the Authority, invested in a Fund or Fund Share monies from their capital bases which are not required to be invested in qualified investments shall be allowed a tax credit equal to no more than ten percent of the investor's investment in the Fund.

6.1.2. Maximum Per Investor. -- Unless waived by the Authority, the total amount of tax credits authorized for a single investor may not exceed Two Million Dollars during any single State fiscal year.

6.2. Total Credits. -- The total credits which may be authorized by the Authority in each fiscal year is set forth in the Act.

6.3. Certificate of Tax Credit. -- The Authority shall issue to each investor the Authority's Certificate approving the amount of tax credits allocated to the investor. The Authority's Certificate shall list the name of the investor and the amount of credit allotted to the investor. An 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 any other pass-through entity, the partners, shareholders, members or owners shall apportion the tax credit among themselves pursuant to the provisions of Subdivision 6.4.f of this Rule.

6.4. Application of Tax Credits.

6.4.a. General Rule. -- The amount of tax credit allowed for the taxable year is the portion of the tax credit authorized that does not exceed the tax liability limitation provided in this Subsection.

6.4.b. Tax Credit Available. -- The credit available for the taxable year is the sum of:

1. Unused tax credit carried forward from prior taxable years (carryforwards); and
2. The amount of tax credits allocated to the investor by the Authority pursuant to the Act and this Rule (tax credits earned).

6.4.c. Tax Liability Limitation. -- Tax credit available for a taxable year beginning after June 30, 2001, shall be applied against the same taxes as set forth in W. Va. Code §11-13C-5(c) through (i), and in that order.

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6.4.d. Excess Tax Credit. -- The excess of the tax credit available over the applicable tax liability limitation for the year is an unused credit which the investor may carry forward as provided for under Subsection 6.5 of this Rule.

6.4.e. 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.

6.4.f. Apportionment.

1. The partners, shareholders, members or owners shall by election and pursuant to this Subdivision 6.4.f. divide the tax credits authorized by the Authority for investments by a Partnership, an S corporation, a limited liability company or other entity which is treated as a pass-through entity under federal and state income tax laws.

2. The partners, S corporation shareholders, limited liability company members or other pass-through entity owners shall apportion the tax credit authorized in any manner they may select, provided that each partner, shareholder, member or owner consents in writing to an apportionment plan.

The written consent to an apportionment plan shall be signed by each partner, shareholder, member or owner, or their duly authorized agents. The written consent 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 owner and the amount of tax credit apportioned to each of them under the plan. The consent of more than one partner, shareholder, member or owner may be incorporated in a single statement. Each partner, shareholder, member or owner shall file the statement with the application required pursuant to Section 5 of this Rule. The statement is irrevocable and not subject to change after filing of the application 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 or owner consenting to an apportionment plan shall keep as part of his or her records a copy of the statement containing all of the required consents.

3. An apportionment plan adopted and consented to by all partners, S corporation shareholders, limited liability company members or other pass-through entity owners is 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 shall be filed with respect to each application filed pursuant to Section 5 of this Rule.

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

6.5. Carryforward of Unused Tax Credit.

6.5.a. General Rule. -- The holder of a tax credit may carry forward an unused tax credit as defined in Subdivision 6.5.b of this Rule to succeeding taxable years but not beyond fifteen (15) years. Carryforwards of unused tax credits shall be 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 forward.

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6.5.b. Unused Credit. -- If carry forwards and tax credits earned exceed the tax liability limitation, the excess attributable to tax credits earned is an unused tax credit. The taxable year in which an unused tax credit arises is referred to as the "unused credit year".

6.5.c. 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.

6.5.d. Joint Return by Husband and Wife. -- This Subdivision 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 credits earned.

1. From Separate to Joint Return. -- If a husband and wife, making a joint return for any taxable year, did not make a joint return for any of the taxable years involved in the computation of the tax credit earned, the separate tax credits apportioned in accordance with Subdivision 6.4.f of this Rule shall together be considered a joint tax credit carryforward to the taxable year.

2. Continuous Use of Joint Return. -- If a husband and wife making a joint return for a taxable year made a joint return for each of the taxable years involved in the computation of the tax credit earned or the tax credit carryforward to the taxable years, the joint tax credit or tax credit carryforward to the taxable year is computed in the same manner as the tax credit carryforward of an individual as provided in Subdivisions 6.5.a through 6.5.c of this Rule.

3. From Joint to Separate Return. -- If a husband and wife making separate returns for a taxable year made a joint return for any, or all, of the taxable years involved in the computation of the tax credit earned or tax credit carryforward to the taxable year, the separate tax credit carryforward of each spouse to the taxable year is computed in accordance with Subdivisions 6.5.a through 6.5.c of this Rule but with the following modification: The tax credit of each spouse for a taxable year for which a joint return was made shall be considered to be that portion of the joint tax credit apportioned to the spouse in accordance with Subdivision 6.4.f of this Rule.

4. Recurrent Use of Joint Return. -- If a husband and wife making a joint return for any taxable year made a joint return for one or more, but not all, of the taxable years involved in the computation of a tax credit carryforward to the taxable years, the taxable year is computed in the manner set forth in Paragraph 6.5.d.3. of this Rule. The tax credit carryforward is considered a joint tax credit carryforward to the taxable year.

5. 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 the taxable year.

6. 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 forward. Divorce and remarriage in joint return cases present special problems. A joint tax credit of one couple cannot be carried forward 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 by the West Virginia Department of Tax and Revenue as a guide.

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6.5.e. Tax Credits Not Assignable. -- No portion of the tax credit earned by any investor is 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 or a limited liability company may be apportioned pursuant to Subdivision 6.4.f of this Rule.

§ 117-3-7. Investment Requirements.

7.1. Investments. -- Each Fund Manager shall invest the assets of the Fund or Fund Share to which the Fund Manager is assigned or which it receives by making debt or equity investments in West Virginia Businesses in accordance with this Section.

7.2. Investments Pursuant to Investment Guidelines. -- The Fund Manager shall invest the assets of each Fund or Fund Share according to the investment guidelines agreed upon between the Fund Manager and the Fund or Governing Entity and set forth in a participation or other agreement entered into by the Fund Manager and the applicable Fund or Governing Entity in accordance with Subdivision 7.6.4 of this Rule.

7.3. Limitation of Qualified Investment. -- No more than thirty percent (30%) of the equity of a Fund or Fund Share raised in accordance with the Act and this Rule may be invested in any one West Virginia Business without the consent of the applicable Fund or Governing Entity.

7.4. Investment Restrictions

7.4.1. Unless the prior written consent of the applicable Fund or Governing Entity is obtained, a Fund Manager may not invest any portion of a Fund or Fund Share in any West Virginia Business where there is a direct or indirect economic relationship, in the form of ownership, compensation or otherwise, between the Fund Manager, inclusive of the Fund Manager's relatives, affiliates or members of its Managing Body, and the West Virginia Business, inclusive of relatives, affiliates and members of the Managing Body. The investment restrictions in this Subdivision are not applicable where the Fund Manager's economic relationship is solely the result of the fact that the Fund Manager has made a previous investment in the West Virginia Business pursuant to the Act or this Rule.

7.4.2. Unless the prior written consent of the applicable Fund or Governing Entity is obtained, a Fund Manager may not invest any portion of or contribution from a Fund or Fund Share in any West Virginia Business where there is a direct or indirect economic relationship, in the form of ownership, compensation or otherwise, between the West Virginia Business, including the relatives, affiliates and members of the Managing Body of the West Virginia Business, and an investor in the Fund or Fund Share, including relatives, affiliates and members of the Managing Body of the investor. The investment restrictions in this Subdivision are not applicable where the investor's economic relationship is solely the result of the fact that the Fund Manager has made a previous investment in the West Virginia Business pursuant to the Act or this Rule.

7.5. Conflict of Interest. -- No officer, member, or employee of the Authority may be financially interested, directly or indirectly, in any Fund Manager or West Virginia Business invested in by a Fund Manager.

7.6. Purchase of Ownership Interest in a Fund Manager.

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7.6.1. Structure. -- At the discretion of the Authority or applicable Governing Entity, a Fund or Fund Share may invest its assets by purchasing an ownership interest in a Federal Program Participant or other Entity serving as the Fund Manager. Such purchase of an ownership interest in the Fund Manager may be by original issue from the Fund Manager or purchased on the secondary market from an owner of the Fund Manager.

7.6.2. Pooling of Assets. -- The assets of the Fund or Fund Share used to purchase an ownership interest in its Fund Manager may be pooled with that of other private or public investors holding ownership interests in the Fund Manager so that the assets of the Fund or Fund Share contributed to the Fund Manager may become indistinguishable from those of the other owners of the Fund Manager.

7.6.3. Investments. -- In situations where the Fund or Fund Share purchases an ownership interest in its Fund Manager, the Fund Manager may invest its assets, including those of the Fund or Fund Share, in businesses located in various states: Provided, That the Fund Manager must invest an amount equal to or exceeding the amount contributed by the Fund or Fund Share, net of reasonable management fees and operational expenses allocable to the Fund under the applicable Participation Agreement, in the form of debt or equity investments in West Virginia Businesses in accordance with this section.

7.6.4. Investment Guidelines. -- In the Participation Agreement or other agreement executed by the applicable Fund or Governing Entity and the Fund Manager, the Fund or Governing Entity and the Fund Manager shall contractually agree on the investment guidelines to be followed by the Fund Manager when investing in West Virginia Businesses.

7.7. Where the Fund or Fund Share Does Not Purchase an Ownership Interest In Its Fund Manager. -
- In situations where the Fund or Fund Share does not purchase an ownership interest in its Fund Manager:

7.7.1. Unless the prior written consent of the Governing Entity is obtained, the Fund Manager shall not obtain ownership of assets of the Fund or Fund Share. Rather, the Fund Manager, at least fifteen (15) days before the closing of an investment in a West Virginia Business, shall advise the applicable Governing Entity in writing of the funds to be invested to allow the applicable Governing Entity to make the funds available for investment by the Fund Manager at closing;

7.7.2. Unless the prior written consent of the Governing Entity is obtained, the Fund Manager shall make, and at all times maintain, all investments on the name of the applicable Fund; and

7.7.3. The Fund Manager shall have discretion as to the selection of West Virginia Businesses for investment and the terms upon which such investments are made; however, the applicable Fund or Governing Entity may at all times revoke or restrict such discretion of the Fund Manager and submit investment guidelines to be followed by the Fund Manager.

§117-3-8. Liquidation of a Fund or Fund Share; Repurchase of Investor Ownership Interests.

8.1. Liquidation of Entire Fund or Fund Share. Unless otherwise set forth in the applicable Governance Agreement, the subscription agreement or any other document agreed to by the investors, at any time after the 5th anniversary of the first investment made by the Fund Manager of a Fund or Fund Share in a West Virginia Business, the Fund or Fund Share may be liquidated at the unanimous written consent of all investors of such Fund or Fund Share or at the discretion of the applicable Governing Entity. Upon liquidation, the assets of the Fund or Fund Share shall be distributed in cash or in kind to the investors of the Fund or Fund Share on a pro rata basis.

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8.2. Repurchase of Investor Ownership Interests. Unless otherwise set forth in the applicable Governance Agreement, the subscription agreement or such other document agreed to by the investors, at any time after the 5th anniversary of the first investment made by the Fund Manager of the Fund or Fund Share in a West Virginia Business, an investor in such Fund or Fund Share may, upon written request to the applicable Governing Entity, have all or any portion of such investor's ownership interest repurchased at a value agreed to by the Governing Entity and the investor. Upon such repurchase of the investor's ownership interest, the investor shall receive, in the discretion of the applicable Governing Entity, cash and/or a distribution in kind of assets of the Fund or Fund Share which collectively equals the value agreed to by the Governing Entity and the investor.

§117-3-9. Audits and Reports.

9.1. Reporting. -- Each Fund Manager shall, at least quarterly, submit to the applicable Governing Entity, the Authority and to each investor reports which set forth the following:

9.1.a. With regard to each West Virginia Business invested in during that quarter, the name and address of the business, a description of the activities of the business and a description of the investment made in the business and the terms of the investment;

9.1.b. The percentage of the Fund or Fund Share which has been invested to date;

9.1.c. The status and performance of each outstanding investment;

9.1.d. The effect investments by the Fund have had on the ability of West Virginia Businesses invested in to increase or retain employment of domiciled West Virginians; and

9.1.e. Any other information requested by the applicable Governing Entity or the Authority.

9.2. Affidavit from Businesses Invested In. -- Prior to closing of a Fund's investment in a West Virginia Business, the Fund Manager shall secure from each West Virginia Business invested in affidavits prepared by an authorized officer, partner, limited liability company member or manager, or trustee of the West Virginia Business invested in which demonstrate:

9.2.a. That the business invested in is a West Virginia Business as defined in Subsection 2.25 of this Rule;

9.2.b. That the investment does not violate the investment restrictions set forth in Subsection 7.4 of this Rule; and

9.2.c. The effect the investment by the Fund is expected to have on the ability of the business invested in to increase or retain employment of domiciled West Virginians.

9.2.d. The affidavits shall be delivered by the Fund Managers to the applicable Governing Entity and the Authority no later than fifteen (15) days prior to closing.

9.3. Annual Audit and Report. -- For each Fund or Fund Share, an audit shall be conducted annually by a certified public accountant, beginning at the end of the first State fiscal year in which the Fund or Fund Share was created and each year thereafter until the Fund or Fund Share is liquidated by the applicable Governing Entity. The cost of the audit shall be paid by the Fund or Fund Share.

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9.4. General Requirements for Audits. -- The following requirements apply to audits of a Fund or Fund Share:

9.4.a. Independent CPA. -- The certified public accountant shall be independent of the Fund or Fund Share being examined to ensure that the audit report is impartial, in fact and in appearance.

9.4.b. Working Papers; Standards. -- In performing the audit, the accountant shall prepare working papers in accordance with the generally accepted accounting and auditing standards of field work. The accountant shall retain working papers for an audit for a minimum of three (3) years from the date of the audit report, or longer if notified in writing by the Authority before the end of the three (3) year period. The audit 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 standards, and any other guidelines the Authority may prescribe.

9.4.c. Report Contents. -- The audit report shall address the methods of operation and conduct of the business of the Fund or Fund Share and report on the Fund Manager's compliance with the requirements of the Act and this Rule. In particular the report shall address whether the Fund Manager has made proper and timely investments. Any instances of noncompliance shall be specifically cited. If the accountant finds that the Fund Manager has been in compliance, the accountant shall make a positive statement to that effect.

9.4.d. Submission of Report. -- The Fund Manager shall submit to the applicable Governing Entity and the Authority three certified copies of the audit report no later than ninety (90) days from the end of each State fiscal year, together with three copies of a descriptive narrative of the Fund Manager's activities, its methods of operation of the Fund or Fund Share and three copies of the Fund or Fund Share's financial statements.

9.4.e. Other Requirements. -- The Governing Entity or the Authority may dictate other audit requirements from time to time.

§117-3-10. Confidentiality.

10.1. General Rule. -- All information submitted to the Authority is confidential and not subject to public disclosure when filed with the Authority, except as otherwise provided in this Section and in the Act.

10.2. Application Information. -- All information submitted to the Authority or the applicable Governing Entity pursuant to (i) an application for designation as a Fund Manager and (ii) an application for designation as an investor, and documents related to the applications, are confidential and not subject to public disclosure when filed with the Authority, except the following:

1. The full legal name of the Entity making the application;
2. The mailing and office addresses and telephone number of the applicant; and
3. The name of a person to contact for the applicant.

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10.3. Investment Information. -- All information regarding the investments made by Fund Managers in West Virginia Businesses is confidential and not subject to public disclosure, except the following:

1. The name of the Fund or Fund Share from which the investment was made;
2. The name, address and telephone number of each West Virginia Business receiving an investment, specified as to the investing Fund or Fund Share;
3. Whether the investment was a debt investment, equity investment, or combination of those investments, specified as to the West Virginia Business invested in; and
4. Whether the amount of each 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 invested in.

10.4. Performance of Fund or Fund Share. -- All information pertaining to the performance of the Fund or a Fund Share is confidential and not subject to public disclosure unless permitted by the applicable Governing Entity.

10.5. Ruling Request Information. -- All information submitted to the Authority regarding a ruling request pursuant to Section 12 of this Rule is confidential and not subject to public disclosure when filed with the Authority, except that the Authority may publish or make available to the public a summary of the ruling request provided that all names and other identifying facts are omitted.

10.6. General Correspondence. -- All general correspondence of or to the Authority is confidential and not subject to public disclosure.

10.7. Examination & Audit Information. -- 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 Fund or Fund Share is confidential and not subject to public disclosure, except where the public disclosure results from proceedings contemplated by Section 11 of this Rule.

10.8. Internal Information. -- Unless otherwise provided, all information generated internally by the Authority including but not limited to internal memoranda and reports is confidential and not subject to public disclosure.

10.9. Tax Information. -- All tax returns and tax return information subject to the non-disclosure restrictions of W. Va. Code §11-10-5d is confidential, except for the information subject to disclosures authorized, mandated or permitted pursuant to W. Va. Code § 5E-2-4(g) or 11-10-5s.

10.10. Authority Determination. -- In addition to the information described in this section and 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 the information is non-confidential.

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10.11. Request for Confidentiality. -- Any person submitting information to the Authority which is classified as non-confidential by this Rule or the Act shall be treated as non-confidential and subject to disclosure unless the person submitting the information makes a showing, satisfactory to the Authority at the time the information is submitted, that the information should be treated as confidential. Any person desiring to make a submission shall indicate in writing what information is requested to be treated in a confidential manner and the basis upon which the treatment is justified. A person making a request may submit the information desired to be treated as confidential separately from other information submitted. If the Authority concurs with the request then the information shall be treated as confidential. If the Authority disagrees with the requested treatment then the Authority shall notify the person submitting the information and give the person a reasonable opportunity to withdraw the information.

10.12. Disclosure to State Personnel. -- Notwithstanding any provisions of the Act or this Rule, 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 this Rule and may be disclosed pursuant to proceedings under Section 11 of this Rule. The provisions of the West Virginia Code regarding confidentiality and the disclosure of tax returns and tax information, including without limitation W. Va. Code §11-10-5d, apply to the Authority, its agents and employees and to information submitted to the Authority under the Act and this Rule.

§117-3-11. Investigation; Remedies.

11.1. Investigation by Authority. -- The Authority may examine, under oath, any of the Fund Managers, investors, or West Virginia Businesses invested in, and any owners, members of the Managing Body, employees or agents thereof, with regard to any matters which the Authority may consider necessary to ensure compliance with the Act and this Rule. The Authority may issue subpoenas and subpoenas duces tecum, and administer oaths relative to any examination.

11.2. Remedies. -- In the event of the failure of any individual or Entity to comply with the Act or this Rule, the remedies set forth in the applicable Governance Agreement, participation agreement or other applicable agreements or documents govern in addition to all remedies or relief available at law to the Authority, the Fund or the State.

§117-3-12. Ruling Procedure.

12.1. General Rule. -- Any person may request an informal ruling from the Authority concerning the application of the Act and this Rule to a specific set of facts and circumstances. The Authority shall not issue rulings concerning the tax ramifications of investment in a Fund or Fund Share. Any tax ruling requests shall be directed to the West Virginia Department of Tax and Revenue.

12.2. Request Requirements. -- A ruling request shall meet the following requirements in order to be considered by the Authority:

12.2.a. The ruling request shall be in writing and sent by certified mail to the Authority at the following address: West Virginia Economic Development Authority, NorthGate Business Park, 160 Association Drive, Charleston, WV 25311-1217;

12.2.b. Any factual representations upon which the ruling will be based shall be verified under oath;

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12.2.c. The request shall state the ruling that is requested and shall contain legal analysis in support of the requested ruling;

12.2.d. The request shall be accompanied by a non-refundable filing fee of five hundred dollars (\$500.00) per issue addressed in the ruling requested;

12.2.e. 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; and

12.2.f. Any additional information requested by the Authority shall be submitted in writing. Additional information shall be verified under oath if it involves factual representations.

12.3. Publication of Rulings; Reliance; Modification. -- The Authority may publish or release summaries of previous rulings with facts or characteristics identifying the person or persons requesting the ruling omitted. However, the only persons who may rely upon a ruling by the Authority are those persons who requested and received the ruling. As to those persons, the Authority reserves the right to notify the recipient of the ruling at the recipient's last address known to the Authority that the subject ruling may no longer be relied upon as of the date of the notice. A ruling may be prospectively modified if the Authority determines that the ruling was incorrect or is in conflict with the Act, this Rule or any other substantive legal precedent.

12.4. Denial of Requests. -- The Authority may decline to issue a ruling and return the filing fee to the person requesting the ruling. From time to time, the Authority may announce those areas in which it will not issue rulings.

Bowles Rice
McDavid Graff & Love^{LLP}

19 West Cork Street, Suite 102
Winchester, Virginia 22601
Telephone (540) 723-8877

101 South Queen Street
Martinsburg, West Virginia 25401
Telephone (304) 263-0836

7000 Hampton Center, Suite K
Morgantown, West Virginia 26505
Telephone (304) 285-2500

ATTORNEYS AT LAW

600 Quarrier Street
Charleston, West Virginia 25301

Post Office Box 1386
Charleston, West Virginia 25325-1386
Telephone (304) 347-1100
www.bowlesrice.com

5th Floor, United Square
501 Avery Street
Parkersburg, West Virginia 26101
Telephone (304) 485-8500

333 West Vine Street, Suite 1201
Lexington, Kentucky 40507
Telephone (859) 225-8700

April 15, 2004

Amy J. Tawney
Telephone — (304) 347-1123
Facsimile — (304) 343-3058

E-Mail Address:
atawney@bowlesrice.com

Ms. Judy Cooper
West Virginia Secretary of State
Administrative Law Division
State Capitol
1900 Kanawha Blvd. East
Charleston, West Virginia 25305-0770

VIA HAND DELIVERY

Re: Title 117, Series 03, General Administration of the West Virginia Venture Capital Act

Dear Ms. Cooper:

Enclosed for filing with your office is Form 6 and the final version of Title 117, Series 03, General Administration of the Venture Capital Act, which was authorized by the Legislature pursuant to Senate Bill 350 on March 13, 2004. I have enclosed a hard copy and an electronic version (in Word format) of the legislative rule.

If you have any questions, please do not hesitate to contact me at 347-1123.

Sincerely yours,


Amy J. Tawney

AJT/jam
Enclosures

cc: David A. Warner

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