

WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #2

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2003 JUN 25 P 2: 29

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Development Authority TITLE NUMBER: 117

RULE TYPE: Legislative CITE AUTHORITY: W.Va. Code Section 5E-1-5

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 4

TITLE OF RULE BEING PROPOSED: Economic Development and Technology

Advancement Centers

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 31, 2003 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

West Virginia Economic Development Authority

Attn: David T. Fontalbert

NorthGate Business Park

160 Association Drive

Charleston, West Virginia 25311

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.



Authorized Signature

David A. Warner, Executive Director

ATTACH A BRIEF SUMMARY OF YOUR PROPOSAL

Attachment to Form # 2

Brief Summary of Proposal

Pursuant to West Virginia Code § 29A-3-15(f), the West Virginia Economic Development Authority (the "Authority") finds an emergency exists requiring the promulgation of an emergency rule. A statement of the facts and circumstances constituting this emergency are as follows:

During the 2003 Regular Legislative Session, the West Virginia Legislature passed Senate Bill 646, which amended the West Virginia Code by adding a new Article 12A to Chapter 18B. The purpose of Article 12A, Chapter 18B was to: (i) authorize the establishment of independent entities to be known as centers for economic development and technology advancement ("Centers"); (ii) establish conditions for the organization of Centers; (iii) establish the power and duties of Centers; (iv) encourage and facilitate private sector participation in and support of research and economic development grants and opportunities in collaborations with doctoral institutions; and (v) provide a mechanism for doctoral institutions to enter into agreements with Centers for economic development, training, education and technology research and development.

In order to further stimulate economic development in West Virginia and to promote higher education in West Virginia, the West Virginia Legislature passed Senate Bill 657 during its 2003 Regular Session, which amended certain sections of Article 1, Chapter 5E of the West Virginia Code. The purpose of Senate Bill 657 was to make tax credits available to taxpayers investing in Centers organized pursuant to Article 12A, Chapter 18B and designated by the Authority as qualified Centers. Article 1 of Chapter 5E does not set forth the procedure for the Authority to "qualify" Centers for the purpose of allocating tax credits to investors in such Centers. However, Senate Bill 657 amended West Virginia Code § 5E-1-5 to provide the Authority with the power to "promulgate additional rules in accordance with article three, chapter twenty-nine-a of this code that it considers necessary to provide for the efficient administration of the credits allowed for investments in economic development and technology advancement centers." Accordingly, the Authority has promulgated the attached proposed emergency rules to establish procedures: (i) for Centers to make application to the Authority for designation as a qualified Center; and (ii) for the Authority to review the applications and to allocate tax credits in accordance with the West Virginia Capital Company Act. The proposed emergency rules establish the maximum number of tax credits and how the tax credits are to be allocated and apportioned. In addition, the proposed emergency rules impose certain reporting and auditing requirements on qualified Centers.

Senate Bill 646 became effective on March 16, 2003, and Senate Bill 657 became effective on June 6, 2003. Accordingly, the promulgation of the proposed emergency rules are necessary for the immediate preservation of the public welfare and

to prevent substantial harm to the public interest. If the proposed emergency rules are not approved, then Centers will be unable to make application to the Authority to qualify for tax credits under the West Virginia Capital Company Act and the tax credits will be unavailable to investors investing in Centers. The entire purpose of Senate Bills 646 and 657 will be defeated if the proposed emergency rules are not promulgated.

TITLE 117
LEGISLATIVE RULE
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY

SERIES 4
ECONOMIC DEVELOPMENT AND TECHNOLOGY ADVANCEMENT CENTERS

§117-4-1. General.

1.1. Scope. -- This Legislative Rule is promulgated to provide for the efficient administration of the credits allowed for investments in economic development and technology advancement centers.

1.2. Authority. -- W. Va. Code § 5E-1-5.

1.3. Filing Date. --

1.4. Effective Date. -- .

1.5. Citation. -- This Legislative Rule may be cited as 117 C.S.R., Series 4, §).

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§117-4-2. Definitions.

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

2.2. "Agreement" means any agreement or contractual relationship entered into between a Doctoral Institution and a Center pursuant to the provisions of article twelve-a, chapter eighteen-b of the Code of West Virginia.

2.2. "Approved Institution of Higher Education" means:

(a) A State institution of higher education as defined in W. Va. Code § 18B-1-2: Alderson-Broadus College, Appalachian Bible College, Bethany College, the College of West Virginia, Davis and Elkins College, Ohio Valley College, Salem-Teikyo College, the University of Charleston, West Virginia Wesleyan College and Wheeling Jesuit College, all in West Virginia; and

(b) Any other regionally or nationally accredited institution of higher education in this State, public or private, approved by the Vice Chancellor for Administration if the institution has been licensed for a minimum of fifteen years subject to the provisions of W. Va. Code §§ 18C-3-5 and 18C-1B-4.

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

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

2.5. "Capital Base" means equity capital or net worth.

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

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

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

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

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

2.7. "Center" means a center for economic development and technology advancement created pursuant to W. Va. Code § 18B-12A-3.

2.8. "Certified West Virginia Capital Company" means:

1. A West Virginia business development corporation created pursuant to W. Va. Code § 31-14-1 et seq.

2. A profit or nonprofit entity organized and existing under the laws of this State, created for the purpose of making venture or risk capital available to qualified investments that has been certified by the Authority.

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

2.10. "Doctoral Institution" means a State institution of higher education as defined in W. Va. Code § 18B-8-1(d).

2.11. "Entity" means a non-profit, non-stock corporation organized exclusively for charitable, educational or scientific purposes within the meaning of § 501(c) of the Internal Revenue Code of 1986, as amended, or a corporation, a partnership, limited partnership, limited liability company, trust or other business organization authorized under the West Virginia Code.

2.12. "Equity" means common stock or preferred stock in a corporation including warrants and options which upon exercise entitle the holder to common or preferred stock. Equity also means a membership interest in a partnership or limited partnership or an ownership interest in any other type of entity, including warrants or options to purchase such ownership interest.

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

2.14. "Governing Body" means the Governing Body of a Center.

2.15. "Investor" means an individual or Entity which has made a Qualified Investment in a Center.

2.16. "Grant" or "Grant Program" means a Grant or the Grant Program authorized and established by the provisions of Chapter 18C, Article 5 of the West Virginia Code.

2.17. "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.

2.18. "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.

2.19. "Person" includes an individual or Entity.

2.20. "President" means the chief executive officer of a Center employed pursuant to W. Va. Code § 18A-12A-5.

2.21. "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.

2.22. "Qualified Investment" means a debt or equity financing of or a gift, grant, or contributions in a Center, which has executed an agreement with a Doctoral Institution pursuant to West Virginia Code § 18B-12A-6.

2.23. "Qualified West Virginia Capital Company" means a small business investment company licensed by the United States Small Business Investment Administration under the federal Small Business Investment Act of 1958, 15 U.S.C. § 661, et seq., as amended.

2.24. "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.

2.25. "Senior Administrator" means the Vice Chancellor for Administration, as provided in W. Va. Code § 18B-1-2.

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

§117-4-3. Purpose.

3.1 Purpose. -- The Act creates a tax credit program whereby investors receive a tax credit by making an investment in a Center authorized by the Authority to partner with institutions of higher education qualified pursuant to West Virginia Code § 18B-12A-1, et seq. Each Center shall be governed by a Governing Body comprised of members of both the private business and industry sector and of the Doctoral Institution affiliated with the Center. Each Center shall be an Entity authorized by the Authority for the purpose of receiving investments from Investors desiring a tax credit. The Center will enter into an agreement with a Doctoral Institution for one or more of the following purposes:

1. To provide research assistance;
2. To encourage and facilitate private sector participation in and support of research and economic development Grants and opportunities in collaboration with Doctoral Institutions;
3. To expedite the acquisition, administration and management of research and development Grants and opportunities; or

4. To provide technical assistance in the commercialization of research opportunities.

§117-4-4. Centers.

4.1. Establishment of Centers. -- Centers are established in accordance with W. Va. Code § 18B-12A-3.

4.2. Formation. -- Each Center shall be formed with respect to a specific Doctoral Institution and meet the following conditions:

4.2.1. Representatives from private sector business and industry shall constitute a majority of the voting members of the Governing Body of each Center;

4.2.2. The president of the appropriate Doctoral Institution or a senior member of the Doctoral Institution's administrative staff shall be a member of the appropriate Governing Body;

4.2.3. Each Center shall be organized as one of the following:

(A) A non-profit, non-stock corporation created under the general corporation laws of the State exclusively for charitable, educational or scientific purposes within the meaning of Section 501(c) of the Internal Revenue Code of 1986, as amended; or

(B) A corporation, partnership, limited partnership, limited liability company or other form of Entity authorized to be formed under the West Virginia Code.

4.3. Responsibility of a Center -- The primary responsibility of a Center is to foster and support economic development and the advancement and commercialization of new and emerging technologies through collaboration agreements between business-industry and the Doctoral Institution.

4.4. President of Governing Body -- Each Center shall employ a President who shall be the chief executive officer of the Center and serve at the will and pleasure of the Governing Body. The Center shall be under the control and supervision of the President who, with the approval of the Governing Body, may employ staff as is necessary to carry out the Center's purpose and scope.

4.4.1 The Governing Body of the Center shall set the qualifications for the position of President and shall conduct a thorough search for qualified candidates. A qualified candidate is one who meets at least the following criteria:

(a) Possesses a broad understanding of the relationship between public and private sector research, the advancement and commercialization of new and emerging technologies and economic development and has significant experience and an established professional reputation in these fields;

(b) Holds, at a minimum, a bachelor's degree in a field related to the duties and responsibilities of the position of President;

(c) Demonstrates specifically that he or she has developed effective and successful Grant management skills, as well as skill in fostering collaborations between business-industry and Doctoral Institutions;

(d) Demonstrates strong communication skills and the ability to work with all types of businesses and industry, government agencies and higher education institutions; and

(e) Possesses other skills, qualifications or attributes as the Governing Body may consider appropriate or desirable.

4.5. Powers and Duties of Governing Body and Centers. -- The primary responsibility of each Center is to foster and support economic development and the advancement and commercialization of new and emerging technologies through collaboration agreements between business-industry and the respective Doctoral Institution. To that end, the Governing Body of each Center has the following powers and duties:

(a) To adopt and amend, from time to time, a statement of purpose and scope of operations. When the Governing Body amends the purpose or scope of a Center, the Governing Body shall advise the appropriate Doctoral Institution of the changes;

(b) To employ a President subject to the provisions of W. Va. Code § 18B-12A-5;

(c) To approve employment of other staff recommended by the President as being necessary and appropriate to carry out the purpose and scope of the Center;

(d) To serve as fiscal agent and provide additional services, including, but not limited to, evaluation of technology, verification and assessment of market applications, grant administration and human resource management for any Entity associated with the Doctoral Institution if the Entity is engaged in business-industry collaborations, technology advancement and commercialization activities and research into new areas of economic development;

(e) To meet as a governing body: *provided, that* Centers created under W. Va. Code § 18B-12A-3 are exempt from the provisions of W. Va. Code § 6-9a-3 and W. Va. Code § 29B-1-1 et seq.;

(f) To receive, purchase, hold, lease, use, sell and dispose of real and personal property of all classes, including all kinds of intellectual property, subject to the provisions of W. Va. Code § 18B-12A-10;

(g) To receive and accept from any public or private agency, corporation, association, person, partnership, company or any other organization or Entity of any nature whatsoever grants to be expended in accomplishing the objectives of Article 12A, Chapter 18B of the West Virginia Code and to receive and accept from the State, from any municipality, county or other political subdivision of the State and from any other source, aid or contributions of either money, property or other things of value to be held, used and applied only for the purposes for which the Grants and contributions may be made;

(h) To accept and expend any gift, Grant, contribution, bequest, endowment or other money for the purposes of Article 12A, Chapter 18B of the West Virginia Code and to make a maximum effort to encourage external support for the Center's programs. Any transfer of endowment or other assets by the Doctoral Institution to a Center or by the Center to the Doctoral Institution for management or investment shall be formalized in a memorandum of agreement to assure, at a minimum, that any restrictions governing the future disposition of funds are preserved;

(i) To make, amend and repeal bylaws and rules consistent with the provisions of Article 12A, Chapter 18B of the West Virginia Code to carry into effect the purpose and scope of the Center and, subject to such directions and limitations as may be contained in its governing documents, to delegate the exercise of any of its powers to the President except for the power to approve budgets; to make, amend or repeal its governing documents; or to alter the purpose or scope of the Center;

(j) In addition to the powers and duties provided for in this Section 4.5 and any other powers and duties that may be assigned to it by law or agreement, each Center has such other powers and duties as may be necessary or expedient to accomplish the objectives of Article or 12A, Chapter 18B of the West Virginia Code as provided by law.

4.6 Governing Bodies. -- Each Center shall be governed by a board of directors or other Governing Body comprised of members of both the private business and industry sector and from the Doctoral Institution affiliated with the Center:

(a) Representatives from private sector business and industry will constitute a majority of the voting members of the Governing Body of each Center;

(b) The President of the Doctoral Institution affiliated with the Center or a senior member of the Doctoral Institution's administrative staff, appointed by the President of the Doctoral Institution, will be a member of the Center's Governing Body; and

(c) In order to maintain the independence of the Center as a liaison between the Doctoral Institution and its business-industry partners, a majority of the voting members of the Governing Body of the Center shall not be employed by or affiliated with the Doctoral Institution.

§117-4-5. Qualification of Economic Development and Technology Advancement Center.

5.1. Applications. -- Qualified economic development and technology advancement centers under the West Virginia Capital Company Act, W. Va. Code §§ 5E-1-1 et seq., must receive the prior written approval of the Authority in order to be designated as a qualified economic development and technology advancement center. The application process and the requirements for designation are set forth in this Rule.

5.2. Application Receipt and Review.

5.2.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.

5.2.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.

5.2.c. Review of Applications.

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. -- 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 a Center, 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.

5.3. 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.

5.4. 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.

5.5. 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.

5.6. 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 Center.

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

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

5.9. 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.

§117-4-6. Tax Credits.

6.1. Maximum Authorized Credits.

6.1.1. Generally. -- Each Investor in a Center shall be allowed a tax credit equal to one hundred percent of the Investor's investment in a Center.

6.1.2. Maximum Per Investor. -- Unless waived by the Authority, the total amount of tax credits authorized for a single Investor in a Center may not exceed One Million Dollars (\$1,000,000) 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.

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. Any Center formed as a non-profit, non-stock corporation which has been allocated tax credits shall apportion the tax credits to contributors to the Center as the contributors to the Center may agree.

3. 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.

6.5.b. Unused Credit. -- If carryforwards 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 6.5.d. 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.

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.

§ 117-4-7. Agreement with Doctoral Institution.

7.1. Notwithstanding W. Va. Code § 12-3-10 or any other provision of law to the contrary, each Doctoral Institution is hereby authorized to enter in agreements with one or more Centers; *provided, that* each Center is formed with respect to that specific Doctoral Institution and meets the conditions set forth either in W. Va. Code § 18B-12A-3(2)(a) or (b).

7.2. Any agreement with a Center shall benefit the Doctoral Institution or one or more of its schools, departments or institutes whose purpose is to further economic development, training, education and technology research and development in its region.

7.3. If part of the agreement, the Center may be charged with the responsibility of serving as fiscal agent for specified sponsored projects conducted by the faculty, staff and students of the Doctoral Institution pursuant to terms of the agreement and Grants shall be accepted by the Center on behalf of the Doctoral Institution and assigned to the Center for fiscal management.

7.4. If an agreement is terminated, the funds, contributions or Grants paid or held by the Center and not encumbered or committed prior to termination shall be distributed as provided for in the agreement.

7.5. If part of the agreement, a Center may utilize both Center employees and personnel of the Doctoral Institution. The Center may pay the costs incurred by the Doctoral Institution, including personnel funded on Grants and contracts, fringe benefits of personnel funded on Grants and contracts, administrative support costs and other costs which may require reimbursement. The Center may include as costs any applicable overhead and fringe benefit assessments necessary to recover the costs expended by the Doctoral Institution, pursuant to the terms of the agreement, and the Doctoral Institution may be reimbursed for expenses incurred by it pursuant to the agreement.

§117-4-8. Reports and Audits.

8.1 Conflicts of Interest. -- Notwithstanding any other provision of this Rule to the contrary, officers and employees of a governing board and the affected Doctoral Institution may hold appointments to offices of the Center and be members of its Governing Body or officers or employees of other entities contracting with either the Center or a governing board of a Doctoral Institution. The Governing Body shall make an annual report of these appointments to the Doctoral Institution.

8.2. General Requirements for Audits. -- The following requirements apply to audits of a Center:

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

8.2.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.

8.2.c. Report Contents. -- The audit report shall address the methods of operation and conduct of the business of the Center and report on the Center's compliance with the requirements of the Act and this Rule. Any instances of noncompliance shall be specifically cited. If the accountant finds that the Center has been in compliance, the accountant shall make a positive statement to that effect.

8.2.d. Submission of Report. -- The Center shall submit to the applicable Governing Entity and the Authority three (3) 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 Center's activities, its methods of operation of the Center and three (3) copies of the Center's financial statements.

8.2.e. Other Requirements. -- The Authority may dictate other audit requirements from time to time.

§117-4-9. Confidentiality.

9.1. 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.

9.2. Application Information. -- All information submitted to the Authority or the applicable Governing Entity pursuant to an application for designation as a Center, and documents related to the application are confidential and not subject to public disclosure when filed with the Authority, except the following:

1. The full legal name of the Center 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.

9.3. Ruling Request Information. -- All information submitted to the Authority regarding a ruling request pursuant to Section 11 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.

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

9.5. 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 Center is confidential and not subject to public disclosure, except where the public disclosure results from proceedings contemplated by Section 10 of this Rule.

9.6. 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.

9.7. 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.

9.8. Authority Determination. -- In addition to the information described in Sections 9.1-9.7 of this Rule 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.

9.9. 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.

9.10. 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 10 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.

§117-4-10. Investigation; Remedies.

10.1. Investigation by Authority. -- The Authority may examine, under oath, any of members of the Center's Governing 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.

10.2. Remedies. -- In the event of the failure of any individual or Entity to comply with the Act or this Rule, the Authority may pursue all remedies or relief available at law to the Authority or the State.

§117-4-11. Ruling Procedure.

11.1. 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. Any tax ruling requests shall be directed to the West Virginia Department of Tax and Revenue.

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

11.2.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, 1018 Kanawha Blvd., Suite 501, Charleston, WV 25301-2828;

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

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

11.2.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;

11.2.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

11.2.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.

11.3. 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.

11.4. 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.

§117-4-12. Sovereign Immunity.

12.1. No Waiver of Sovereign Immunity. -- Nothing contained in this Article may be construed to waive or abrogate in any way the sovereign immunity of the State or to deprive the governing board of a Doctoral Institution, a Doctoral Institution or any officer or employee of a Doctoral Institution of sovereign immunity.

12.2. Obligations of a Governing Body or its Center do not constitute debts or obligations of a Doctoral Institution, the governing board of a Doctoral Institution or the State.

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