

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

Form #3.

Do Not Mark In **FILED** This Box

2004 AUG 24 P 4: 06

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: West Virginia Economic Development Authority TITLE NUMBER: 117

CITE AUTHORITY: W. Va. Code § 11-13U-9

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: 5

TITLE OF RULE BEING PROPOSED: High-Growth Business Investment Tax Credit

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

David A. Warner

Authorized Signature

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 24, 2004

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* West Virginia Economic Development Authority

NorthGate Business Park, 160 Association Drive,

Charleston, WV 25311-1217 Phone: 558-3650

LEGISLATIVE RULE TITLE: High-Growth Business Investment Tax Credit

1. Authorizing statute(s) citation W.Va. Code § 11-13U-9

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

7/16/04

b. What other notice, including advertising, did you give of the hearing?

None

c. Date of Public Hearing(s) *or* Public Comment Period ended:

8 /16/04

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received _____

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

8/24/04

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

David A. Warner, Executive Director of West Virginia Economic
Development Authority, NorthGate Business Park, 160 Association

Drive, Charleston, WV 25311-1217; Phone: 558-3650

Fax: 558-0206; Email: DWarner@WVEDA.org

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

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

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

N/A

b. Date of hearing or comment period:

N/A

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

N/A

d. Attach findings and determinations and reasons:

Attached N/A

West Virginia Economic Development Authority
Legislative Rule
Title 117, Series 5

HIGH-GROWTH BUSINESS INVESTMENT TAX CREDIT

TITLE 117, SERIES 5

BRIEF SUMMARY OF RULE

The Rule is intended to provide for the general administration of the High-Growth Business Investment Tax Credit, W. Va. Code §§11-13U-1 et seq. The Rule carries out the policy and purposes of the Article, provides necessary clarification of the provisions of the Article, and provides for general administration of the Article. The Rule is authorized by W. Va. Code §11-13U-9.

West Virginia Economic Development Authority
Legislative Rule
Title 117, Series 5

HIGH-GROWTH BUSINESS INVESTMENT TAX CREDIT

TITLE 117, SERIES 5

STATEMENT OF CIRCUMSTANCES

H.B. 4047, which was passed March 12, 2004, and becomes effective June 10, 2004 created the High-Growth Business Investment Tax Credit, W. Va. Code §§11-13U-1 et seq. W. Va. Code §11-13U-9 authorizes the economic development authority to promulgate rules to carry out the policy and purposes of the Article, to provide necessary clarification of the provisions of the Article, and to efficiently provide for general administration of the Article.

□
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: High-Growth Business Investment Tax Credit

Type of Rule: XX Legislative _____ Interpretive _____ Procedural

Agency: West Virginia Economic Development Authority

Address: NorthGate Business Park, 160 Association Drive, Charleston, WV 25311-1217

1. Effect of Proposed rule:

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

2. Explanation of Above Estimates:

N/A

3. Objectives of These Rules:

The Rule is intended to provide for the general administration of the High-Growth Business Investment Tax Credit, W. Va. Code §§11-13U-1 et seq. by carrying out the policy and purposes of the Article and clarifying the Article.

Rule Title: High-Growth Business Investment Tax Credit

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:
N/A

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens: N/A

C. Economic Impact on Citizens/Public at Large.
N/A

Date: 8/24/04

Signature of Agency Head or Authorized Representative:

David A. Warner

FILED

TITLE 117
WEST VIRGINIA LEGISLATIVE RULE 2004 AUG 24 P 4: 06
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY

SERIES 5 OFFICE WEST VIRGINIA
HIGH-GROWTH BUSINESS INVESTMENT TAX CREDIT. SECRETARY OF STATE

§117-5-1. General.

1.1. Scope. -- This Legislative Rule is promulgated to provide for the general administration of the High-Growth Business Investment Tax Credit, W. Va. Code §§11-13U-1 et seq. This Rule carries out the policy and purposes of the Article, provides necessary clarification of the provisions of the Article, and provides for the general administration of the Article.

1.2. Authority. -- W. Va. Code §11-13U-9.

1.3. Filing Date. -- _____.

1.4. Effective Date. -- _____.

1.5. Citation. -- This Legislative Rule may be cited as 117 C.S.R., Series 5, §117-5- _____ (_____).

§117-5-2. Definitions.

2.1. "Alter ego" means a qualified research and development company where one or more of the following criteria are satisfied in relation to the eligible taxpayer:

2.1.a. The ownership of the qualified research and development company is "substantially related" to the ownership of the eligible taxpayer stated on the application. "Substantially related" means a five percent or more common ownership interest in the qualified research and development company before the qualified investment is made that is eligible for the credit; or

2.1.b. The board of directors, managers or general partners of the qualified research and development company are controlled by the eligible taxpayer stated on the application: *Provided*, That an eligible taxpayer is deemed to have control of the board of directors of a qualified research and development company if it controls a simple majority of the board of directors, managers or general partners.

2.1.c. For the purposes of the Article, common ownership interest shall be determined in accordance with the beneficial ownership rules under Rule 13d-3 under the Securities Exchange Act of 1934 (17 C.F.R. §240-13d-3).

2.2. "Article" means the "High-Growth Business Investment Tax Credit" (W. Va. Code §11-13U-1 et seq.).

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

2.4. "Control", for purposes of subdivision 2.1.b, means the right or power to appoint, elect, or select, directly or indirectly, fifty percent or more of the directors, managers or general partners of a qualified research and development company.

2.5. "Corporate headquarters" means the place at which the corporation has its commercial domicile and from which the business of the corporation is primarily conducted.

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

2.7. "Eligible taxpayer" means a person that has received certification from the economic development authority that a portion of the annual available high-growth business investment tax credit has been allocated to it, that is subject to the tax imposed by either W. Va. Code §§11-23-1 et seq., 11-24-1 et seq., or 11-21-1 et seq., and that has made a qualified investment in a qualified research and development company.

2.8. "Equity financing" means financing by selling common or preferred stock or ownership or partnership units or interests to investors.

2.9. "Person" includes any natural person, corporation, limited liability company, or partnership.

2.10. "Qualified investment" means an equity financing of a West Virginia qualified research and development company. The investment must be in cash or cash equivalents and may not be a contribution of services or in-kind property.

2.11. "Qualified research and development company" for purposes of the high-growth business investment tax credit means an entity that has been certified by the Tax Commissioner as eligible for the West Virginia research and development tax credit set forth in W. Va. Code §11-13R-1 et seq., that has annual gross receipts of less than twenty million dollars and has annual payroll of less than two million five hundred thousand dollars.

2.12. "Tax Commissioner" means the West Virginia Tax Commissioner or his or her designated representative.

2.13. "Tax credit" means the high-growth business development tax credit authorized by the Article.

2.14. "Taxable year" means the tax year of the eligible taxpayer.

§117-5-3. Overview of the Tax Credits.

3.1. Purpose. -- The Article creates a tax credit program whereby investors receive a tax credit by making equity investments in start-up, growth-oriented, research and development businesses in West Virginia.

3.2. Tax Credit Allowed. -- The tax credits are available to eligible taxpayers who invest in a qualified research and development company that maintains its corporate headquarters in West Virginia for the taxable year in which the investment was made. Eligible taxpayers may claim the tax credit against that portion of their Business Franchise Tax, Corporation Net Income Tax and Personal Income Tax for tax years beginning on or after July 1, 2005.

3.2.a. No more than one million dollars of the tax credits allowed under W. Va. Code §11-13U-4(a) shall be allocated by the Authority during any fiscal year. The Authority shall allocate the tax credits in the order the applications therefor are received, as discussed in subsection 4.5 below.

3.2.b. The Authority may allocate more than fifty thousand dollars to an eligible taxpayer in a fiscal year if the taxpayer contributes more than one hundred thousand dollars in that fiscal year. However, pursuant to subdivision 3.4.b below, the taxpayer may only use fifty thousand dollars of the tax credit in a single taxable year. Any unused portion of the tax credit may be carried forward to succeeding taxable years until the expiration of the fourth taxable year after the taxable year in which the investment was made. The tax credit remaining thereafter is forfeited.

3.2.c. To the extent that an eligible taxpayer's investment exceeds the \$100,000 investment eligible for tax credits to be used in the current year, it shall be offset against the current year's tax credit allocation by the Authority.

3.2.c.1. Example: The eligible taxpayer makes a \$500,000 investment in a qualified research and development company. The Authority will allocate to the eligible taxpayer a \$250,000 tax credit. The eligible taxpayer may take \$50,000 a year in tax credits for years one through five. The remaining credit to be allocated by the Authority in year one will be \$750,000.

3.3. Termination of the Tax Credit.

3.3.a. The Article is scheduled to terminate July 1, 2008, unless sooner terminated by law.

3.3.b. Absent statutory directive to the contrary, taxpayers who have gained entitlement to the tax credit pursuant to a qualified investment made prior to the termination date shall retain that entitlement and apply the tax credit in due course pursuant to the requirements and limitations of the Article.

3.4. Amount of Tax Credit.

3.4.a. The total tax credit that may be allocated to an eligible taxpayer under the Article shall be equal to fifty percent of the total value of the qualified investment in the taxable year the qualified investment was actually made.

3.4.b. The total amount of tax credit that may be used in any taxable year by any eligible taxpayer in combination with the owners of the eligible taxpayer may not exceed fifty thousand dollars.

3.4.c. The total amount of qualified investment that a qualified research and development company may accept from all eligible taxpayers in any taxable year is one million dollars.

§117-5-4. Application for the Tax Credit.

4.1. Prerequisites to Claiming the Tax Credit -- No tax credit is allowed or may be applied under the Article until the taxpayer seeking to claim the credit has:

4.1.a. Filed with the Authority a written application for the tax credit on forms provided by the Authority;

4.1.b. Filed with the Authority the research and development program or project certification issued pursuant to W. Va. Code §11-13R-6 for the qualified research and development company that will benefit from the investment;

4.1.c. Filed with the Authority a certified copy of its certificate of incorporation, articles of organization, certificate of formation of limited partnership or statement of limited liability partnership, as appropriate; and

4.1.d. Received from the Authority certification of the amount of tax credit to be allocated to the eligible taxpayer, as described in subsection 4.9 below.

4.2. Contents of the Application. -- The application shall be signed and verified by the applicant or by a duly authorized representative of the applicant, and shall, in addition to the items required by subdivisions 4.1.b and 4.1.c, contain the following:

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

4.2.b. The applicant's physical address, mailing address and telephone number;

4.2.c. If the applicant is a business entity, a copy of the applicant's bylaws, operating agreement or partnership agreement certified as a true and correct copy thereof by an officer, manager, member or partner of the entity;

4.2.d. If the applicant is a corporation, a copy of any agreements effective among the shareholders, including shareholder agreements as described in W. Va. Code §31D-7-732 or a statute of similar import;

4.2.e. If the applicant is a business entity, the names and addresses of, as applicable, the individuals and entities serving on the board of directors or other managing body of the applicant or as the manager(s) or general partner(s) of the applicant. The addresses shall include street and number, city or town, state and zip code;

4.2.f. If the applicant is a business entity, the names and addresses of, as applicable, the individuals and entities having an ownership interest in the applicant and the percentage of such entity owned by each such owner. The addresses shall include street and number, city or town, state and zip code;

4.2.g. An agreement that the applicant, if accepted as an eligible taxpayer, does, and will, comply with all requirements of the Article and this Rule;

4.2.h. A statement as to the amount of proposed qualified investment in a qualified research and development company;

4.2.i. A completed Form WV-ARI-001, Authorization to Release Information, or any subsequent applicable document of similar import, required for the applicant to waive tax confidentiality provisions found in the West Virginia Code; and

4.2.j. Any and all additional information or statements as requested by the Authority.

4.3. Application Forms. -- The form for applying to become an eligible taxpayer 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.

4.4. Filing. -- Each applicant shall file with the Director three (3) complete applications with original signatures.

4.5. Application Receipt and Review.

4.5.a. 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 July 1, 2005; 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 July 1, 2005.

4.5.b. 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.

4.5.c. 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 thirty (30) 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, but such resubmission of the application must be made within twenty (20) days after the Authority sends 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.

4.5.c.1. 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 allocation by the

Authority, 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.

4.5.c.2. If the total tax credits sought by all the simultaneously received applications exceed the tax credits authorized for allocation by the Authority, after taking into account applications reviewed previously and determined to be complete or substantially complete, and tax credits still remain, the Director shall, within thirty (30) days, but not earlier than five (5) days, after receipt of the applications, conduct a lottery to determine the order of review of the simultaneously received applications as follows:

4.5.c.2.A. The Director shall provide all applicants that submitted simultaneously received applications with written notice of the lottery and the opportunity for their designated representative to attend the lottery.

4.5.c.2.B. To conduct the lottery, the Director shall: (1) prepare for each applicant, on index cards of the same fundamental character, an index card setting forth the applicant's name and the amount of tax credits sought by the applicant in its application; (2) deposit one index card for each applicant in a container; (3) select and draw from the container one index card in a manner that the Director may not determine until after the card is drawn from the container the identity of the applicant; (4) announce and record the applicant whose index card was drawn and the amount of tax credits sought by that applicant; and (5) repeat steps (3) and (4) until all applicants' cards are drawn from the container.

4.5.c.2.C. Each application shall be then reviewed for completeness by the Director in the order in which it was drawn from the container.

4.5.c.2.D. 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.

4.5.c.2.E. If for any reason an applicant selected for a tax credit allocation does not make its qualified investment, the Authority shall award the unused credit to the next qualified applicant.

4.6. 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.

4.7. 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.

4.8. Action of Authority. -- The allocation of all tax credits under this Rule must be approved by the Authority. The Authority shall consider all completed applications in the order they are placed on the agenda of any duly or regularly scheduled meeting of the Authority, and allocate tax credits under this Rule by approving those meeting the requirements of the Article and this Rule.

4.9. Allocation of Tax Credits. -- In the order set forth in this section 4, the Authority shall issue certificates of the amount of tax credit to be allocated to each eligible taxpayer.

§117-5-5. Application of the Tax Credit.

5.1. Business Franchise Tax. -- The tax credit is first applied to reduce taxes imposed upon the eligible taxpayer by W. Va. Code §11-23-1 et seq. for the taxable year (determined after application of the credits against tax provided in W. Va. Code §11-23-17, but before application of any other allowable credits against tax).

5.2. Corporation Net Income Taxes. -- After application of subsection 5.1, any unused tax credit is next applied to reduce the taxes imposed upon the eligible taxpayer by W. Va. Code §11-24-1 et seq. for the taxable year (determined before application of allowable credits against tax).

5.2.a. If the eligible taxpayer is a limited liability company, an electing small business corporation (as defined in section 1361 of the United States Internal Revenue Code of 1986, as amended), or a partnership, any unused tax credit remaining after application of subsections 5.1 and 5.2 is allowed as a tax credit against the taxes imposed by W. Va. Code §11-24-1 et seq. on owners of the eligible taxpayer.

5.2.a.1. Electing small business corporations, limited liability companies, and partnerships shall allocate the tax credit allowed by the Article among their owners in the same manner as profits and losses are allocated for the taxable year.

5.3. Personal Income Taxes. -- After application of subsections 5.1 and 5.2 and subdivision 5.2.a any unused tax credit is next applied to reduce the taxes imposed by W. Va. Code §11-21-1 et seq. for the taxable year (determined before application of allowable credits against tax) of the eligible taxpayer.

5.3.a. If the eligible taxpayer is a limited liability company, an electing small business corporation (as defined in section 1361 of the United States Internal Revenue Code of 1986, as amended), or a partnership, any unused tax credit remaining after application of subsections 5.1, 5.2 and 5.3 and subdivision 5.2.a is allowed as a tax credit against the taxes imposed by W. Va. Code §11-21-1 et seq. on owners of the eligible taxpayer.

5.3.a.1. Electing small business corporations, limited liability companies, and partnerships shall allocate the tax credit allowed by the Article among their owners in the same manner as profits and losses are allocated for the taxable year.

5.4. Withholding tax -- No tax credit is allowed under the Article against any withholding tax imposed by, or payable under, W. Va. Code §11-21-1 et seq.

5.5. Unused Credit Carry Forward. -- If the tax credit allowed under the Article in any taxable year exceeds the sum of taxes enumerated in subsections 5.1, 5.2 and 5.3 and subdivisions 5.2.a and 5.3.a for that taxable year, the eligible taxpayer and owners of eligible taxpayers described in subdivisions 5.2.a and 5.3.a may apply the excess as a tax credit against those taxes, in the order and manner stated in this section, for succeeding taxable years until the earlier of the following:

5.5.a. The full amount of the excess tax credit is used; or

5.5.b. The expiration of the fourth taxable year after the taxable year in which the investment was made. The tax credit remaining thereafter is forfeited.

§117-5-6. Restrictions on Investment.

6.1. Alter Ego. -- No qualified investment may be made in a qualified research and development company that is the alter ego of the eligible taxpayer.

6.2. Time Requirement for Investment.

6.2.a. The eligible taxpayer shall maintain its qualified investment for a minimum period of five years.

6.2.b. An eligible taxpayer that receives repayment or return of a qualified investment (exclusive of interest, dividends, or other earnings on the investment) shall within three calendar months from the date of repayment or return of its investment, reinvest the repaid or returned amount of the initial investment in another qualified research and development company for a period of time at least equal to the remainder of the initial five-year term.

6.2.c. An eligible taxpayer that fails to maintain a qualified investment for the required five-year minimum period shall pay to the Tax Commissioner a penalty equal to all of the tax credits asserted under the Article by the eligible taxpayer with interest, calculated at the rate set forth in W. Va. Code §11-10-17a, from the date the tax credits were certified as allocated to the eligible taxpayer. The Tax Commissioner shall give notice to the eligible taxpayer of any imposed penalties. The penalty shall be assessed and collected in the same manner as tax. The Tax Commissioner shall deposit any amounts received as a result of a penalty in the general revenue fund.

6.3. Amount that Qualified Research and Development Company May Accept. -- The total amount of qualified investment that a qualified research and development company may accept from all eligible taxpayers in any taxable year is one million dollars.

§117-5-7. Tax Credit Review and Accountability.

7.1. Generally. -- Beginning February 1, 2006, and on the first day of February every third year thereafter, the Tax Commissioner shall submit to the governor, the president of the Senate, and the speaker of the House of Delegates a tax credit review and accountability report evaluating the cost effectiveness of the tax credit allowed under the Article during the most recent three-year period for which information is available.

7.2. Termination. -- The requirement to file the tax credit review and accountability report terminates on June 30, 2011, unless the credit program terminates sooner.

7.3. Criteria for Evaluation. -- The criteria to be evaluated includes, but is not limited to, for each year of the three-year period:

7.3.a. The number of eligible taxpayers claiming the tax credit;

7.3.b. The net number, type, and duration of new jobs created in West Virginia by all qualified research and development companies in which taxpayers claiming the tax credit made investments and the wages and benefits paid by the qualified research and development companies to persons filling the new jobs;

7.3.c. The cost of the tax credit;

7.3.d. The cost of the tax credit per new job created; and

7.3.e. Comparison of employment trends for the industry and for taxpayers within the industry that claim the tax credit.

7.4. Requirement of Taxpayers Claiming the Tax Credit. -- Eligible taxpayers claiming the tax credit shall provide information required by the Tax Commissioner for the purpose of preparing the report. Information that eligible taxpayers are required to provide shall be subject to the confidentiality and disclosure provisions of W. Va. Code §§11-10-5d and 11-10-5s.

§117-5-8. Confidentiality.

8.1. 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 Article.

8.2. Application Information. -- All information submitted to the Authority pursuant to an application for designation as an eligible taxpayer and documents related to the application, are confidential and not subject to public disclosure when filed with the Authority, except the following:

8.2.a. The full legal name of the Entity making the application;

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

8.2.c. The name of a person to contact for the applicant.

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

8.4. 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.

8.5. Disclosure of Tax Credits. -- Notwithstanding any provision in the West Virginia Code to the contrary, the Tax Commissioner shall annually publish in the state register the name and address of every eligible taxpayer asserting the credit on one or more tax returns filed during the period of time covered by the report and the amount of any tax credit asserted by the taxpayer under the Article.

8.6. 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 §11-10-5s.

§117-5-9. General Procedure and Administration.

9.1. Requirements to Claim the Tax Credit. -- To claim this tax credit, a taxpayer shall comply with the provisions of W. Va. Code §11-13U-1 et seq. and this Rule, and shall timely provide complete and accurate forms, schedules and other information required by the Tax Commissioner.

9.1.a. The taxpayer shall file required forms, schedules and information requested by the Tax Commissioner by the due date of the return for the taxes against which the tax credit is to be applied, with regard to any extension of time for filing but without regard to any extension of time for payment.

9.2. Applicability of Various Tax Laws. -- Application of this credit and eligibility for this credit shall not abrogate application of the provisions of W. Va. Code §11-23-1 et seq. (Business Franchise Tax), W. Va. Code §11-24-1 et seq. (Corporation Net Income Tax) and W. Va. Code §11-21-1 et seq. (Personal Income Tax), and rules issued pursuant to those statutes, with respect to any eligible taxpayer or owner of any eligible taxpayer to the extent that they may be subject to the provisions of those laws, and shall not abrogate application of the provisions of W. Va. Code §11-10-1 et seq. (Procedure and Administration) which provide for administration of those taxes.

9.3. Maintenance of Records. -- A taxpayer that does not maintain the records required to verify the validity of its eligibility for the tax credit and the accuracy of the amount of the tax credit claimed may be denied the tax credit or be subject to recapture to the extent the eligibility and accuracy are not substantiated by its records.

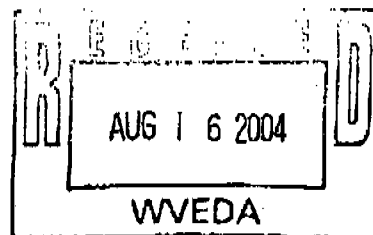


STATE OF WEST VIRGINIA
Department of Tax and Revenue
State Tax Department

Bob Wise
Governor

Rebecca Melton Craig
State Tax Commissioner

August 16, 2004



David Warner
Executive Director
WVEDA
Northgate Business Park
160 Association Drive
Charleston, WV 25311-1217

Re: Comments on proposed legislative rule 117 CSR Series 5, implementing the High-Growth Business Investment Tax Credit, W. Va. Code §11-13U-1 et seq.

Dear Mr. Warner:

Staff of the State Tax Department has reviewed the above-referenced proposed legislative rule and offer the following comments:

Comment 1. Our initial concern is with the investment and credit limitations discussed in paragraphs 117-5-3.2.b, 117-5-3.2.c and 117-5-3.2.c.1 of the proposed legislative rule.

In our view, these paragraphs, as presently drafted, would allow the WVEDA to effectively approve up to \$5 million in tax credits during the first year instead of the statutory \$1 million tax credit cap. WVEDA could simply inform all qualified taxpayers that excess credits above the cap could be carried forward in a prorated fashion over the remaining four years. The taxpayers would incur some risk in the event that annual pre-credit tax liability fails to meet or exceed the annual credit carryover allotment for any one year during the five-year period.

If \$5 million in tax credits are approved in the first year, WVEDA could possibly find itself not being able to approve any new tax credits after that year. In addition, a total of up to \$5 million in tax credits would be approved instead of the statutory total of \$3 million (i.e., the \$1 million cap in FY2006, FY2007 and FY2008).

Additionally, we believe the carryover provision applies to any unused credit on the taxpayer's annual tax return, not to credit allotments above the statutory \$50,000 cap per taxpayer.

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Comment 2. We believe the definition of "alter ego" in subsection 2.1 of the proposed rule needs to be clarified in paragraphs (a) and (b). We suggest amending those provisions to read as follows:

2.1. "Alter ego" means a qualified research and development company where one or more of the following criteria are satisfied in relation to the eligible taxpayer:

(a) The ownership of the qualified research and development company is "substantially related" to the ownership of the eligible taxpayer stated on the application. "Substantially related" means a five percent or more common ownership interest, directly or indirectly, in the qualified research and development company before the qualified investment is made that is eligible for the credit; or

(b) The board of directors, managers or general partners of the qualified research and development company are controlled by the eligible taxpayer stated on the application: *Provided*, That an eligible taxpayer is deemed to have control of the board of directors of a qualified research and development company if it controls a simple majority of the board of directors, managers or general partners.

Comment 3: In addition to these changes in subsection 2.1, we believe the rule should be amended to explain how the Authority will determine indirect ownership. For example, will the rules of IRC § 267 be used, or will something else be used? A copy of I.R.C. § 267 is included in the Appendix to this letter.

Comment 4: The language of a number of other provisions of the proposed rule should be modified to promote clarity or ease of readability. We suggest changing the following provisions to read as follows. Strike-throughs indicate language that would be deleted while underscoring indicates new language that would be added:

2.13. "Tax Commissioner" means the West Virginia Tax Commissioner of the ~~West Virginia State Tax Department~~ or his or her designated representative.

3.2.c.1. Example: Investor A makes a \$500,000 investment in a qualified research and development company. The Authority will allocate to Investor A a \$250,000 tax credit. Investor A may take \$50,000 a year in

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tax credits for years one through five. The credit remaining to be allocated by the Authority in each of years one through five will be \$950,000.

3.3.b. Absent statutory directive to the contrary, taxpayers who have gained entitlement to the tax credit pursuant to a qualified investment made prior to the termination date shall retain that entitlement and apply the tax credit in due course pursuant to the requirements and limitations of the Article.

4.1.(c). Filed with the Authority a certified copy of ~~the~~ its certificate of incorporation, articles of organization, certificate of formation of limited partnership or statement of limited liability partnership, as appropriate.

As to paragraph 4.3, we believe the address shown in paragraph 4.3 needs to be updated.

4.5.c.2.(b) To conduct the lottery, the Director shall: (1) prepare for each applicant, on index cards of the same fundamental character, an index card setting forth the applicant's name and the amount of tax credits sought by the applicant by in its application; (2) deposit one index card for each applicant in a container; (3) select and draw from the container one index card in a manner that the Director may not determine until after the card is drawn from the container the identity of the applicant set forth on the index card; (4) announce and record the name of the applicant whose index card was drawn and the amount of tax credits sought by that applicant; and (5) repeat steps (3) and (4) until all applicants' cards are drawn from the container.

7.2. Termination. – The requirement to file the tax credit review and accountability report terminates on June 30, 2011, unless the ~~termination of entitlement to the tax credit as stated in W. Va. Code § 11-13U-10~~ terminates credit program terminates sooner.

7.3(b) The number, type, and duration of new jobs created in West Virginia by all qualified research and development companies in which taxpayers claiming the tax credit made investments, ~~in~~ and the wages and benefits paid by ~~such~~ the qualified research and development companies to persons filling the new jobs;

8.5. Disclosure of Tax Credits. – Notwithstanding any provision in the West Virginia Code to the contrary, the Tax Commissioner shall

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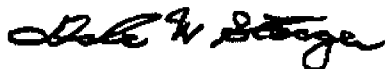
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annually publish in the state register the names and addresses of every eligible taxpayer asserting the credit on one or more tax returns filed during the period of time covered by the report and the amount of any tax credit asserted by the taxpayer under the Article.

9.2. Applicability of Various Tax Laws. – ~~When applying for this tax credit, a taxpayer is also subject to~~ Application of this credit and eligibility for this credit shall not abrogate application of the provisions of W. Va. Code § 11-23-1 et seq. (Business Franchise Tax), W. Va. Code § 11-24-1 et seq. (Corporation Net Income Tax) and W. Va. Code § 11-21-1 et seq. (Personal Income Tax), and rules issued pursuant to those statutes, as well as to with respect to any eligible taxpayer or owner of any eligible taxpayer to the extent that they may be subject to the provisions of those laws, and shall not abrogate application of the provisions of W. Va. Code § 11-10-1 et seq. (Procedure and Administration) which provide for administration of those taxes.

Should you have any questions about this letter or need additional information, please contact me.

Sincerely yours,



Dale W. Steager
Deputy Tax Commissioner

DWS/cn

APPENDIX – IRC § 267

I.R.C. § 267. Losses, expenses, and interest with respect to transactions between related taxpayers

(a) In general.

(1) *Deduction for losses disallowed.* – No deduction shall be allowed in respect of any loss from the sale or exchange of property, directly or indirectly, between persons specified in any of the paragraphs of subsection (b). The preceding sentence shall not apply to any loss of the distributing corporation (or the distributee) in the case of a distribution in complete liquidation.

(2) *Matching of deduction and payee income item in the case of expenses and interest.* – If–

(A) by reason of the method of accounting of the person to whom the payment is to be made, the amount thereof is not (unless paid) includible in the gross income of such person, and

(B) at the close of the taxable year of the taxpayer for which (but for this paragraph) the amount would be deductible under this chapter, both the taxpayer and the person to whom the payment is to be made are persons specified in any of the paragraphs of subsection (b),

then any deduction allowable under this chapter in respect of such amount shall be allowable as of the day as of which such amount is includible in the gross income of the person to whom the payment is made (or, if later, as of the day on which it would be so allowable but for this paragraph). For purposes of this paragraph, in the case of a personal service corporation (within the meaning of section 441(i)(2)), such corporation and any employee-owner (within the meaning of section 269A(b)(2), as modified by section 441(i)(2)) shall be treated as persons specified in subsection (b).

(3) *Payments to foreign persons.* – The Secretary shall by regulations apply the matching principle of paragraph (2) in cases in which the person to whom the payment is to be made is not a United States person.

(b) *Relationships.* – The persons referred to in subsection (a) are:

(1) Members of a family, as defined in subsection (c)(4);

(2) An individual and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual;

(3) Two corporations which are members of the same controlled group (as defined in subsection (f));

(4) A grantor and a fiduciary of any trust;

(5) A fiduciary of a trust and a fiduciary of another trust, if the same person is a grantor of both trusts;

(6) A fiduciary of a trust and a beneficiary of such trust;

(7) A fiduciary of a trust and a beneficiary of another trust, if the same person is a grantor of both trusts;

(8) A fiduciary of a trust and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for the trust or by or for a person who is a grantor of the trust;

(9) A person and an organization to which section 501 (relating to certain educational and charitable organizations which are exempt from tax) applies and which is controlled directly or indirectly by such person or (if such person is an individual) by members of the family of such individual;

(10) A corporation and a partnership if the same persons own—

(A) more than 50 percent in value of the outstanding stock of the corporation, and

(B) more than 50 percent of the capital interest, or the profits interest, in the partnership;

(11) An S corporation and another S corporation if the same persons own more than 50 percent in value of the outstanding stock of each corporation;

(12) An S corporation and a C corporation, if the same persons own more than 50 percent in value of the outstanding stock of each corporation; or

(13) Except in the case of a sale or exchange in satisfaction of a pecuniary bequest, an executor of an estate and a beneficiary of such estate.

(c) *Constructive ownership of stock.* – For purposes of determining, in applying subsection (b), the ownership of stock—

(1) Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by or for its shareholders, partners, or beneficiaries;

(2) An individual shall be considered as owning the stock owned, directly or indirectly, by or for his family;

(3) An individual owning (otherwise than by the application of paragraph (2)) any stock in a corporation shall be considered as owning the stock owned, directly or indirectly, by or for his partner;

(4) The family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants; and

(5) Stock constructively owned by a person by reason of the application of paragraph (1) shall, for the purpose of applying paragraph (1), (2), or (3), be treated as actually owned by such person, but stock constructively owned by an individual by reason of the application of paragraph (2) or (3) shall not be treated as owned by him for the purpose of again applying either of such paragraphs in order to make another the constructive owner of such stock.

(d) Amount of gain where loss previously disallowed. – If–

(1) in the case of a sale or exchange of property to the taxpayer a loss sustained by the transferor is not allowable to the transferor as a deduction by reason of subsection (a)(1) (or by reason of section 24(b) of the Internal Revenue Code of 1939); and

(2) after December 31, 1953, the taxpayer sells or otherwise disposes of such property (or of other property the basis of which in his hands is determined directly or indirectly by reference to such property) at a gain,

then such gain shall be recognized only to the extent that it exceeds so much of such loss as is properly allocable to the property sold or otherwise disposed of by the taxpayer. This subsection applies with respect to taxable years ending after December 31, 1953. This subsection shall not apply if the loss sustained by the transferor is not allowable to the transferor as a deduction by reason of section 1091 (relating to wash sales) or by reason of section 118 of the Internal Revenue Code of 1939.

(e) Special rules for pass-thru entities.

(1) *In general.* – In the case of any amount paid or incurred by, to, or on behalf of, a pass-thru entity, for purposes of applying subsection (a)(2)--

(A) such entity,

(B) in the case of–

(i) a partnership, any person who owns (directly or indirectly) any capital interest or profits interest of such partnership, or

(ii) an S corporation, any person who owns (directly or indirectly) any of the stock of such corporation,

(c) any person who owns (directly or indirectly) any capital interest or profits interest of a partnership in which such entity owns (directly or indirectly) any capital interest or profits interest, and

(D) any person related (within the meaning of subsection (b) of this section or section 707(b)(1)) to a person described in subparagraph (B) or (c).

shall be treated as persons specified in a paragraph of subsection (b). Subparagraph (C) shall apply to a transaction only if such transaction is related either to the operations of the partnership described in such subparagraph or to an interest in such partnership.

(2) *Pass-thru entity.* – For purposes of this section, the term "pass-thru entity" means–

(A) a partnership, and

(B) an S corporation.

(3) *Constructive ownership in the case of partnerships.* – For purposes of determining ownership of a capital interest or profits interest of a partnership, the principles of subsection (c) shall apply, except that–

(A) paragraph (3) of subsection (c) shall not apply, and

(B) interests owned (directly or indirectly) by or for a C corporation shall be considered as owned by or for any shareholder only if such shareholder owns (directly or indirectly) 5 percent or more in value of the stock of such corporation.

(4) *Subsection (a)(2) not to apply to certain guaranteed payments of partnerships.* – In the case of any amount paid or incurred by a partnership, subsection (a)(2) shall not apply to the extent that section 707(c) applies to such amount.

(5) *Exception for certain expenses and interest of partnerships owning low-income housing.*

(A) *In general.* – This subsection shall not apply with respect to qualified expenses and interest paid or incurred by a partnership owning low-income housing to–

(i) any qualified 5-percent or less partner of such partnership, or
(ii) any person related (within the meaning of subsection (b) of this section or section 707(b)(1)) to any qualified 5-percent or less partner of such partnership.

(B) *Qualified 5-percent or less partner.* – For purposes of this paragraph, the term "qualified 5-percent or less partner" means any partner who has (directly or indirectly) an interest of 5 percent or less in the aggregate capital and profits interests of the partnership but only if–

(i) such partner owned the low-income housing at all times during the 2-year period ending on the date such housing was transferred to the partnership, or

(ii) such partnership acquired the low-income housing pursuant to a purchase, assignment, or other transfer from the Department of Housing and Urban Development or any State or local housing authority.

For purposes of the preceding sentence, a partner shall be treated as holding any interest in the partnership which is held (directly or indirectly) by any person related (within the meaning of subsection (b) of this section or section 707(b)(1)) to such partner.

(C) *Qualified expenses and interest.* – For purpose of this paragraph, the term "qualified expenses and interest" means any expense or interest incurred by the partnership with respect to low-income housing held by the partnership but--

(i) only if the amount of such expense or interest (as the case may be) is unconditionally required to be paid by the partnership not later than 10 years after the date such amount was incurred, and

(ii) in the case of such interest, only if such interest is incurred at an annual rate not in excess of 12 percent.

(D) *Low-income housing.* – For purposes of this paragraph, the term "low-income housing" means--

(i) any interest in property described in clause (i), (ii), (iii), or (iv) of section 1250(a)(1)(B), and

(ii) any interest in a partnership owning such property.

(6) *Cross reference.* – For additional rules relating to partnerships, see section 707(b).

(f) *Controlled group defined; special rules applicable to controlled groups.*

(1) *Controlled group defined.* – For purposes of this section, the term "controlled group" has the meaning given to such term by section 1563(a), except that--

(A) "more than 50 percent" shall be substituted for "at least 80 percent" each place it appears in section 1563(a), and

(B) the determination shall be made without regard to subsections (a)(4) and (e)(3)(C) of section 1563.

(2) *Deferral (rather than denial) of loss from sale or exchange between members.*
– In the case of any loss from the sale or exchange of property which is between members of the same controlled group and to which subsection (a)(1) applies (determined without regard to this paragraph but with regard to paragraph (3))--

(A) subsections (a)(1) and (d) shall not apply to such loss, but

(B) such loss shall be deferred until the property is transferred outside such controlled group and there would be recognition of loss under consolidated return principles or until such other time as may be prescribed in regulations.

(3) Loss deferral rules not to apply in certain cases.

(A) Transfer to DISC. – For purposes of applying subsection (a)(1), the term "controlled group" shall not include a DISC.

(B) Certain sales of inventory. – Except to the extent provided in regulations prescribed by the Secretary, subsection (a)(1) shall not apply to the sale or exchange of property between members of the same controlled group (or persons described in subsection (b)(10)) if--

(i) such property in the hands of the transferor is property described in section 1221(a)(1),

(ii) such sale or exchange is in the ordinary course of the transferor's trade or business,

(iii) such property in the hands of the transferee is property described in section 1221(a)(1), and

(iv) the transferee or the transferor is a foreign corporation.

(C) Certain foreign currency losses. – To the extent provided in regulations, subsection (a)(1) shall not apply to any loss sustained by a member of a controlled group on the repayment of a loan made to another member of such group if such loan is payable in a foreign currency or is denominated in such a currency and such loss is attributable to a reduction in value of such foreign currency.

(4) Determination of relationship resulting in disallowance of loss, for purposes of other provisions. – For purposes of any other section of this title which refers to a relationship which would result in a disallowance of losses under this section, deferral under paragraph (2) shall be treated as disallowance.

(g) *Coordination with section 1041.* – Subsection (a)(1) shall not apply to any transfer described in section 1041(a) (relating to transfers of property between spouses or incident to divorce).

HIGH-GROWTH BUSINESS INVESTMENT TAX CREDIT

TITLE 117, SERIES 5

RESPONSE TO COMMENTS FROM STATE TAX DEPARTMENT

Comment 1: Subdivisions 3.2.b, 3.2.c and paragraph 3.2.c.1 were not changed. The subdivisions and the paragraph had already been revised before the final version of the proposed rule was submitted to the Secretary of State's Office on July 16, 2004. The State Tax Department had reviewed an earlier version of the rule and commented on that version. The State Tax Department indicated that the amendment satisfied its concerns with the version of subdivisions 3.2.b. and 3.2.c and paragraph 3.2.c.1 that it reviewed.

Comment 2: Amended subdivisions 2.1.a and 2.1.b to clarify the definition of "alter ego". Accepted the suggestions provided by the State Tax Department. Amendments were stylistic.

Comment 3: Added subdivision 2.1.c to clarify the method to determine common ownership interest for purposes of subdivision 2.1.a. Did not accept the suggestion made by the State Tax Department to use the rules of Internal Revenue Code § 267 to determine ownership. Incorporated the beneficial ownership rules under Rule 13d-3 under the Securities Exchange Act of 1934 (17 C.F.R. §240-13d-3) instead.

Comment 4: Adopted the change to the definition of "Tax Commissioner". (On the proposed rule reviewed by the Tax Department, "Tax Commissioner" was defined under subsection 2.13. On final version provided to Secretary of State's Office on July 16, 2004, "Tax Commissioner" was defined under subsection 2.12.) Change was not substantive. Amendment was stylistic.

Paragraph 3.2.c.1 was not changed. Paragraph 3.2.c.1 had already been revised before the final version of the proposed rule was submitted to the Secretary of State's Office on July 16, 2004. The State Tax Department had reviewed an earlier version of the rule and commented on that version. The State Tax Department indicated that the amendment satisfied its concerns with the version of paragraph 3.2.c.1 that it reviewed.

Subdivision 3.3.b was amended per the State Tax Department's comment. The subdivision was amended to clarify that a taxpayer that made a qualified investment prior to the termination date of the tax credit program will retain their entitlement to the credit absent a statutory directive to the contrary passed by the West Virginia Legislature.

Subdivision 4.1.c was amended per the State Tax Department's comment. The amendments were stylistic.

Section 4.3 had already been revised before the final version of the proposed rule was submitted to the Secretary of State's Office on July 16, 2004.

West Virginia Economic Development Authority
Legislative Rule
Title 117, Series 5

Subparagraph 4.5.c.2.B was amended per the State Tax Department's comment. The amendments were stylistic.

Section 7.2 was amended per the State Tax Department's comment. The amendments were stylistic.

Subsection 7.3.b was amended per the State Tax Department's comment. The amendments clarified that, in evaluating the cost effectiveness of the tax credit program, the number, type, and duration of jobs created in West Virginia is a factor. The amendments also clarified that the wages and benefits paid to persons filling the new jobs is a factor in the evaluation of the credit program.

Section 8.5 was amended per the State Tax Department's comment. The amendments clarified that the Tax Commissioner shall annually publish in the state register the name and address of every eligible taxpayer asserting the credit on one or more tax returns filed during the period of time covered by the report. . . . The other amendments were stylistic.

Section 9.2 amended per the State Tax Department's comment. The amendments were stylistic.

August 24, 2004

HAND DELIVERED

Ms. Judy Cooper, Director
Administrative Law Division
Secretary of State
Bldg. 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

Re: TITLE 117, SERIES 5 - High-Growth Business Investment Tax Credit

Dear Ms. Cooper:

Please find herewith one (1) copy of the following for the above subject proposed rule:

1. Notice of agency approval and submission to the Legislative Rule-Making and Review Committee, Form #3;
2. Approval of filing the proposed rule signed by the Executive Director of the West Virginia Economic Development Authority, bottom portion of Form #3;
3. Legislative Rule-Making and Review Committee questionnaire;
4. Brief summary of the agency approved rule;
5. Statement of circumstances that require the rule;
6. The Fiscal Note for the Proposed Rule, Appendix B;
7. The agency approved rule; and
8. Comments received from the State Tax Department, amendments made to the proposed rule as a result of such comments, and the reasons for the amendments.

We have also included fifteen (15) additional sets of items #1-8, above to be stamped for filing with the Legislative Rule-Making and Review Committee. In addition, we have included a copy of the agency approved rule on disk for the Legislative Rule-Making and Review Committee.

If you have any other questions, please do not hesitate to contact me.

Very truly yours,



David A. Warner
Executive Director

Enclosures