

**WEST VIRGINIA
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NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

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 RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

David A. Warner

Authorized Signature

TITLE 117
WEST VIRGINIA LEGISLATIVE RULE
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY

SERIES 5
HIGH-GROWTH BUSINESS INVESTMENT TAX CREDIT.

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§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 Statute, provides necessary clarification of the provisions of the Statute, and provides for the general administration of the Statute.

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

2.3. "Control", for purposes of subdivision 2.1.b of this Rule, 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.

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

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

2.6. "Eligible taxpayer" means a person that has received certification from the 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.

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

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

2.9. "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.

2.10. "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.

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

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 Statute.

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

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

3.1. Purpose. -- The Statute creates a tax credit program through which 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) may be allocated by the Authority during any fiscal year. The Authority shall allocate the tax credits in the order the applications are received, as discussed in subsection 4.5 of this Rule.

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 of this Rule, 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 Statute terminates 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 Statute.

3.4. Amount of Tax Credit.

3.4.a. The total tax credit that may be allocated to an eligible taxpayer under the Statute 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 Statute 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;

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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 of this Rule.

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 the Statute, 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 managers or general partners 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 the entity owned by each 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 Statute 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 requested by the Authority.

4.3. Application Forms. -- A person applying to become an eligible taxpayer may obtain the form 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, the Authority shall receive applications on a first come, first served basis beginning on July 1, 2005; provided, that all applications received by the Authority on the same calendar day shall be considered simultaneously received regardless of the time of day of actual delivery. The Authority shall record the time and date of receipt of an application. The Authority may not receive applications prior to July 1, 2005.

4.5.b. Applications shall be considered received by the Authority and submitted by the applicant on the day of actual delivery to the Authority, 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 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 if 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 the identity of the applicant until after the card is drawn from the container; (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; and

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 and allocate tax credits under this Rule by approving those meeting the requirements of the Statute and this Rule.

4.9. Allocation of Tax Credits. -- In the order set forth in this section, 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 of this Rule, 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 of this Rule

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 Statute 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 of this Rule and subdivision 5.2.a of this Rule 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 of this Rule and subdivision 5.2.a of this Rule 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 Statute 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 Statute 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 Statute in any taxable year exceeds the sum of taxes enumerated in subsections 5.1, 5.2 and 5.3 of this Rule and subdivisions 5.2.a and 5.3.a of this Rule for that taxable year, the eligible taxpayer and owners of eligible taxpayers described in subdivisions 5.2.a and 5.3.a of this Rule 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 Statute 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 Statute 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 Statute.

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 applicant;

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 Statute.

8.6. Tax Information. -- All tax returns and tax return information subject to the non-disclosure restrictions of W. Va. Code §11-10-5d are 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 Statute 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.

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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.