

**OCTOBER** 12

Sunday, October 12, 2008

1:00 p.m. to 2:00 p.m.

Legislative Rule-Making  
Review Committee  
(Code §29A-3-10)

Earl Ray Tomblin  
ex officio nonvoting member

Richard Thompson  
ex officio nonvoting member

**Senate**

**House**

Minard, Chairman  
Fanning, Vice Chair  
Prezioso  
Unger  
Boley  
Facemyer

Absent

Brown, Chairman  
Miley, Vice Chair  
Burdiss  
Talbott  
Overington  
Sobonya

The meeting was called to order by Mr. Minard, Co-Chair.

The minutes of the August, 26, 2008, meeting were approved.

Debra Graham, Chief Counsel, explained her abstract on the rule proposed by the **Division of Labor, Packaging and Labeling, 42CSR10**.

Mr. Fanning moved that the proposed rule be approved. The motion was adopted.

Ms. Graham reviewed her abstract on the rule proposed by the **Division of Labor, Method of Sale of Commodities, 42CSR11**.

Mr. Fanning moved that the proposed rule be approved. The motion was adopted.

Ms. Graham explained her abstract on the rule proposed by the **State Tax Department, Repeal of Valuation of Intangible Personal Property Including Stock, Accounts Receivable and Stock in Banks and Capital of Savings and Loan Associations, 110CSR1L**, and stated that the Department has agreed to technical modifications.

Mr. Fanning moved that the proposed rule be approved. The motion was adopted.

Ms. Graham reviewed her abstract on the rule proposed by the **State Tax Department, Combined Returns Pursuant to an Investigation by the Tax Commissioner, 110CSR10K**, and stated that the Department has agreed to technical modifications.

Mark Morton, General Counsel for the State Tax Department, addressed the Committee.

Mr. Burdiss moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham explained her abstract on the rule proposed by the **State Tax Department, West Virginia Film Industry Investment Act, 110CSR13X**, stated that the Department has agreed to technical modifications and responded to questions from the Committee.

Mr. Morton responded to questions from the Committee.

Pam Haynes, Director of the WV Film Office, responded to questions from the Committee.

Ms. Brown moved additional modifications. The motion was adopted.

Ms. Brown moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham reviewed her abstract on the rule proposed by the **State Tax Department, Electronic Filing and Payment of Special District Excise Tax, 110CSR39**, stated that the Department has agreed to technical modifications and responded to questions from the Committee.

Mr. Morton responded to questions from the Committee.

Moved to the foot of the agenda.

Ms. Graham explained her abstract on the rule proposed by the **State Tax Department, Withholding or Denial of Personal Income Tax Refunds from Tax Refunds from Taxpayers Who Owe Municipal Costs, Fines, Forfeitures, or Penalties, 110CSR40**, stated that the Department has agreed to technical modifications and responded to questions from the Committee.

Mr. Morton responded to questions from the Committee.

Ms. Brown moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham reviewed her abstract on the rule proposed by the **State Tax Department, Exchange of Information Agreement Between the State Tax Division and the Department of Health and Human Resources Office of the Inspector General Medicaid Fraud Control Unit, 110CSR50E**, and stated that the Department has agreed to technical modifications.

Ms. Brown moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham explained that an agreement had been made regarding the rule proposed by the **State Tax Department, Electronic Filing and Payment of Special District Excise Tax, 110CSR39.**

Ms. Brown moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham reviewed her abstract on the rule proposed by the **WV Board of Veterinary Medicine, Schedule of Fees, 26CSR6,** stated that the Board has agreed to technical modifications and responded to questions from the Committee.

Wanda Goodwin, Director of the Board of Veterinary Medicine, responded to questions from the Committee the Committee.

Ms. Brown moved that the proposed rule be approved as modified. The motion was adopted.

Rita Pauley, Associate Counsel, explained her abstract on the rule proposed by the **WV Commission Insurance, Continuing Education for Individual Insurance Producers, 114CSR42,** and stated that the Commission has agreed to technical modifications.

Ms. Brown moved that the proposed rule be approved as modified. The motion was adopted.

**WV Commission Insurance, Health Policy Rate and Form Filings, 114CSR84,** was laid over.

Ms. Pauley reviewed her abstract on the rule proposed by the **WV Commission Insurance, Preneed Life Insurance Minimum Standards for Determining Reserve Liabilities and Nonforfeiture Values, 114CSR86,** and stated that the Commission has agreed to technical modifications.

Ms. Brown moved that the proposed rule be approved. The motion was adopted.

Ms. Brown moved to adjourn. The motion was adopted.

OCTOBER INTERIM ATTENDANCE  
Legislative Interim Meetings  
October 12, 13 and 14, 2008

Sunday, October 12, 2008

1:00 pm - 2:00 pm

Legislative Rule-Making Review Committee

Earl Ray Tomblin, ex  
officio nonvoting member

Thompson, ex  
officio nonvoting member

Senate

Minard, Chair  
Fanning, Vice Chair  
Prezioso  
Unger  
Boley  
Facemyer

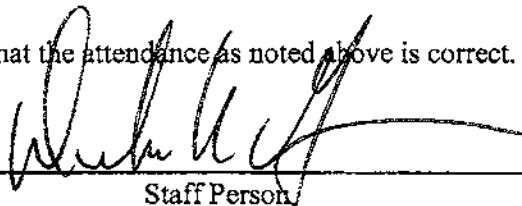
\_\_\_\_\_  
✓  
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\_\_\_\_\_  
✓

House

Brown, Chair  
Miley, Vice Chair  
Burdiss  
Talbot  
Overington  
Sobonya

\_\_\_\_\_  
✓  
✓  
✓  
✓  
✓  
✓

I certify that the attendance as noted above is correct.



\_\_\_\_\_  
Staff Person

Debra Graham

Please return to Brenda in Room 132-E or Fax to 347-4819 ASAP, due to payroll deadline.

**TENTATIVE AGENDA**  
**LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**  
**Sunday, October 12, 2008**  
**1:00 p.m. to 2:00 p.m.**  
**Senate Finance Committee Room**

1. **Approval of Minutes** - Meetings of Tuesday, August 26, 2008.
2. **Review of Legislative Rules:**
  - a. **Labor, Division of**  
*Packaging and Labeling*  
42CSR10
    - Approve
  - b. **Labor, Division of**  
*Method of Sale of Commodities*  
42CSR11
    - Approve
  - c. **State Tax Department**  
*Repeal of Valuation of Intangible Personal Property Including Stock, Accounts Receivable and Stock in Banks and Capital of Savings and Loan Associations*  
110CSR1L
    - Approve
  - d. **State Tax Department**  
*Combined Returns Pursuant to an Investigation by the Tax Commissioner*  
110CSR10K
    - Approve as Modified
  - e. **State Tax Department**  
*West Virginia Film Industry Investment Act*  
110CSR13X
    - Approve as Modified
  - f. **State Tax Department**  
*Electronic Filing and Payment of Special District Excise Tax*  
110CSR39
    - Approve as Modified

- g. **State Tax Department**  
*Withholding or Denial of Personal Income Tax Refunds from Tax Refunds from Taxpayers Who Owe Municipal Costs, Fines, Forfeitures, or Penalties*  
110CSR40
- Approve as Modified
- h. **State Tax Department**  
*Exchange of Information Agreement Between the State Tax Division and the Department of Health and Human Resources Office of the Inspector General Medicaid Fraud Control Unit*  
110CSR50E
- Approve as Modified
- i. **Veterinary Medicine, WV Board of**  
Schedule of Fees  
26CSR6
- Approve as Modified
- j. **Insurance, WV Commission**  
Continuing Education for Individual Insurance Producers  
114CSR42
- Approve as Modified
- k. **Insurance, WV Commission**  
Health Policy Rate and Form Filings  
114CSR84
- Approve as Modified
- l. **Insurance, WV Commission**  
Preneed Life Insurance Minimum Standards for Determining Reserve Liabilities and Nonforfeiture Values  
114CSR86
- Approve as Modified

3. **Other Business**

OCTOBER INTERIM ATTENDANCE

Legislative Interim Meetings

October 12, 13 & 14, 2008

Sunday, October 12, 2008

1:00 p.m. - 2:00 p.m.

Legislative Rule-Making Review Committee

Earl Ray Tomblin, ex  
officio nonvoting member

Richard Thompson, ex  
officio nonvoting member

Senate

House

Minard, Chair

✓

Fanning, Vice Chair

✓

Prezioso

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Unger

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Boley

✓

Facemyer

✓

Brown, Chair

✓

Miley, Vice Chair

✓

Burdiss

✓

Talbott

✓

Overington

✓

Sobonya

✓

Minard called meeting to order  
Approval of minutes

- Labor 42CSR10  
Debra explained  
Janning moved rule  
Approved

- Labor 42CSR11  
Debra explained  
Janning moved rule  
Approved

- Tax 110CSR1K  
Debra explained  
Janning moved rule  
Approved



- TAX 110CSR10K

Debra explained  
Burdick moved rule as modified  
Mark Morton, General Counsel, <sup>W/TAX</sup> addressed  
the Committee.

Approved as modified

- TAX 110CSR13X

Debra explained & responded to ?'s  
Mark Morton responded to ?'s

Pam Haynes, Director of WV Film Office responded  
to ?'s from the Committee

Brown moved ~~rule~~ additional modification

Brown moved rule as modified

Approved as modified

Approv

- TAX 110CSR39

Debra explained & responded to ?'s  
Mark Morton addressed the Committee  
and responded to ?'s

moved to foot of agenda

- TAX 110CSR40

Debra explained & responded to ?'s  
Mark Morton responded to ?'s

Brown moved as modified

Approved as modified

- Tax 110 CSR 50E  
Debra explained  
Brown moved rule as modified  
Approved as modified

- \* 110 CSR 39 continued - Debra & Mark agree  
Brown moved rule as modified  
Approved as modified

- Vet Med 26 CSR 6  
Debra explained and responded to ?'s  
Wanda Goodwin, Director <sup>of Vet Med</sup> responded to ?'s  
Brown moved rule as modified  
Approved as modified

- Insurance 114 CSR 42  
Rita explained  
Brown moved rule as modified  
Approved as modified

- Insurance 114 CSR 84  
Rita <sup>paid</sup> <sup>Insurance</sup> Commissioner request 7 day Over

- Insurance 114 CSR 86  
Rita explained  
Brown moved rule as modified  
Approved as modified

Brown moved to adjourn - Approved

**TENTATIVE AGENDA**  
**LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**  
**Sunday, October 12, 2008**  
**1:00 p.m. to 2:00 p.m.**  
**Senate Finance Committee Room**

1. **Approval of Minutes** - Meeting of Tuesday, August 26, 2008.
2. **Review of Legislative Rules:**

*Approved*

a. **Labor, Division of**  
*Packaging and Labeling*  
42CSR10

- Approve

*Approved*

b. **Labor, Division of**  
*Method of Sale of Commodities*  
42CSR11

- Approve

*Approved*

**State Tax Department**

*Repeal of Valuation of Intangible Personal Property Including  
Stock, Accounts Receivable and Stock in Banks and Capital of  
Savings and Loan Associations*  
110CSR1L

- Approve

*Approved  
25 modified*

d. **State Tax Department**  
*Combined Returns Pursuant to an Investigation by the Tax  
Commissioner*  
110CSR10K

- Approve as Modified

*Approved  
65 modified*

e. **State Tax Department**  
*West Virginia Film Industry Investment Act*  
110CSR13X

- Approve as Modified

*Approved  
65  
modified*

f. **State Tax Department**  
*Electronic Filing and Payment of Special District Excise Tax*  
110CSR39

- Approve as Modified

Approved  
as modified

g. **State Tax Department**  
Withholding or Denial of Personal Income Tax Refunds from Tax Refunds from Taxpayers Who Owe Municipal Costs, Fines, Forfeitures, or Penalties  
110CSR40

- Approve as Modified

Approved  
as modified

h. **State Tax Department**  
Exchange of Information Agreement Between the State Tax Division and the Department of Health and Human Resources Office of the Inspector General Medicaid Fraud Control Unit  
110CSR50E

- Approve as Modified

Approved  
as modified

i. **Veterinary Medicine, WV Board of**  
Schedule of Fees  
26CSR1

- Approve as Modified

Approved  
as modified

j. **Insurance, WV Commission**  
Continuing Education for Individual Insurance Producers  
114CSR42

- Approve as Modified

Laid  
over  
til next  
month

k. **Insurance, WV Commission**  
Health Policy Rate and Form Filings  
114CSR84

- Approve as Modified

Approve  
as modified

l. **Insurance, WV Commission**  
Preneed Life Insurance Minimum Standards for Determining Reserve Liabilities and Nonforfeiture Values  
114CSR86

- Approve as Modified

3. **Other Business**

TITLE 110  
EMERGENCY RULE  
STATE TAX DEPARTMENT  
SERIES 13X  
WEST VIRGINIA FILM INDUSTRY INVESTMENT ACT

§110-13X-5. Requirements for Tax Credit; Application for Tax Credit.

5.1.e. Upon ~~award of a tax credit~~ approval of an eligibility application, eligible company must begin production within one hundred twenty (120) days of ~~issuance approval of the tax credit voucher or certificate~~ or shall otherwise forfeit the right to claim any tax credit for the approved qualified project. Such forfeiture does not preclude the eligible company from resubmitting an eligibility application for the same project at a future date. Upon written request by the eligible company, and prior to the expiration of the one hundred twenty (120) day deadline, the reviewing committee may extend the deadline at its discretion.

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5.2. NOTE: All of the subsections of 5.2 need to be renumbered as follows:

- 5.2.e.1a.
- 5.2.e.2b.
- 5.2.e.3c.
- 5.2.e.4d.
- \*5.2.de

All subsections are incorrectly numbered.  
\*Tax Dept. addendum.

(1): First two lines conflict with statute. Credits not issued until production has completed filming and audit is complete.  
  
(2) Last sentence gives reviewing committee discretion to extend for good cause (e.g., SAG strike). Does not conflict with statute

§110-13X-6. Application Receipt and Review.

6.5. In the event the Film Office determines an eligibility application to be incomplete, the Film Office 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 eligibility application after correcting the deficiencies stated in the notice, but the amended resubmitted eligibility application must be received by the Film Office within twenty (20) days after the Film Office sends the notice, in order for the application to ~~be considered~~ maintain its initial position in the queue. Any amended application that is received by the Film Office more than twenty (20) days after the Film Office sends the notice may, within the sole discretion of the Film Office, be denied further consideration or may be added to the queue based on the actual date of physical receipt of the amended resubmitted application by the Film Office.

HELPS MAKE PROCESS LESS CUMBERSOME ON REVIEWING COMMITTEE:  
  
Striking 6.5.a and 6.5.b does not conflict with the statute nor with the rules. The language is simplified and condensed into one paragraph, which is 6.5.

~~6.5.a. If an eligibility application, though incomplete, is designated by the Film Office as "substantially complete" as determined in the sole discretion of the Film Office, and if the amended resubmitted application is received within the 20 day requirement set forth herein, then the time of receipt of~~



~~the amended resubmitted eligibility application, for the limited purposes of the queue position of the application for review by the reviewing committee, shall be considered to be the time of receipt of the initial eligibility application. However, if the time of receipt of the amended resubmitted application is more than twenty (20) days after the Film Office sends the notice, the applicant's place in the queue is forfeited, and the resubmitted application may, within the sole discretion of the Film Office, be denied further consideration or may be added to the queue based on the actual date of physical receipt of the amended resubmitted application by the Film Office.~~

~~6.5.b. If an eligibility application is not "substantially complete" as determined in the sole discretion of the Film Office, the applicant is required to amend and resubmit the application. And if the amended resubmitted application is received within the 20 day requirement set forth herein, then the time of receipt of the amended resubmitted eligibility application, for all purposes, including the queue position of the application for review by the reviewing committee, shall be the actual time of physical receipt of the amended resubmitted eligibility application by the Film Office. However, if the time of receipt of the amended resubmitted application is more than twenty (20) days after the Film Office sends the notice, the resubmitted application may, within the sole discretion of the Film Office, be denied further consideration or may be added to the queue based on the actual physical date of receipt of the amended resubmitted application by the Film Office.~~

6.6. Requests for Increase in Tax Credit Allocation. – If an eligible company seeks an increase in the amount of tax credits for an approved qualified project, the eligible company must submit an application for modification to the Film Office, which must be submitted by and bear the same signature as the person who submitted the original eligibility application, or a duly authorized representative. Requests for an increase will be placed in the order of receipt of all applications, will be assigned a new application number and will be reviewed separately from the original eligibility application. The reviewing committee shall consider such application at its next scheduled meeting, but within thirty (30) days of receipt, and may request additional information from applicant to assist in its evaluation of the request. Approval will be determined using the same criteria of the review process and based on the availability of any remaining credits for the fiscal year the request is received. The eligible company will be notified in writing of the reviewing committee's decision.

6.7. Other Revisions to Application. – If an eligible company seeks to revise its original eligibility application for a qualified project for reasons other than those identified in 6.6 of this rule, the eligible company must submit an application for modification to the Film Office, which must be submitted by and bear the same signature as the person who submitted the original eligibility application, or a duly authorized representative. The reviewing committee shall consider such application at its next scheduled meeting, but within thirty (30) days of receipt, and may request additional information from applicant to assist in its evaluation of the request. Approval will be determined using the same criteria of the review process. The eligible company will be notified in writing of the reviewing committee's decision.

Adding these two paragraphs do not conflict with the statute or the rules.

The added language provides a process for the reviewing committee to consider modifications to the original application.

- 6.68. False Information. — [renumbered b/c of new 6.6 and 6.7]
- 6.79. Complete Application. — [renumbered b/c of new 6.6 and 6.7]
- 6.810. Action of reviewing committee. [renumbered b/c of new 6.6 and 6.7]

**§110-13X-7. Uses of Credit; unused credit; carry forward; carry back prohibited; expiration and forfeiture of credit.**

7.2.b. The expiration of the second taxable year after the taxable year in which the expenditures were ~~occurred~~incurred. The tax credit remaining thereafter is forfeited; or

7.2.b corrects an error.

\*\*\*

7.5.b. Transferors and sellers shall apply to the Film Office for approval of any transfer, sale or assignment of the tax credit. Any amount of the tax credit that has been transferred or assigned shall be subject to the same limitations and conditions that apply to the eligible company's or seller's entitlement, use and application of the credit. The application for sale, transfer or assignment of the credit shall include the transferor's tax credit balance prior to transfer, the credit certificate number, the name of the seller, the transferor's remaining tax credit balance after transfer, if any, all tax identification numbers for both transferor and transferee, the date of transfer, the amount transferred, a copy of the credit certificate and any other information required by the Film Office or the ~~tax-credit~~Tax Commissioner.

7.5.b corrects an error.

###END OF COMMENTS###

TITLE 110  
LEGISLATIVE RULE  
STATE TAX DEPARTMENT

SERIES 13X

WEST VIRGINIA FILM INDUSTRY INVESTMENT ACT

**§110-13X-1. General.**

1.1. Scope. — This Legislative Rule is promulgated to provide for the general administration of the West Virginia Film Industry Investment Act, W. Va. Code §§ 11-13X-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 §§ 11-13X-9, 11-10-5 and 11-10-5d(f).

1.3. Filing Date. -- \_\_\_\_\_.

1.4. Effective Date. -- January 1, 2008.

1.5. Citation. — This Legislative Rule may be cited as §110 C.S.R., Series 13X.

**§110-13X-2. Definitions.**

2.1. "Commercial exploitation" means reasonable intent for public viewing for the delivery medium used.

2.2. "Film Office" means the West Virginia Film Office, which is a section of the West Virginia Division of Tourism, which, in turn, is a division of the West Virginia Department of Commerce.

2.3. "Direct production expenditure" means a transaction that occurs in the state of West Virginia or with a West Virginia vendor, and includes:

2.3.a. Payment of wages, fringe benefits or fees for talent, management or labor to a person who is a resident of West Virginia;

2.3.b. Payment to a personal services corporation for the services of a performing artist if:

2.3.b.1. The personal services corporation is subject to West Virginia income tax on those payments; and

2.3.b.2. The performing artist receiving the payments from the personal services corporation is subject to West Virginia income tax; and

2.3.c. Any of the following provided by a vendor:



- 2.3.c.1. The story and scenario (script) to be used by a qualified project;
- 2.3.c.2. Set construction and operations, wardrobe, accessories and related services;
- 2.3.c.3. Photography, sound synchronization, lighting and related services;
- 2.3.c.4. Editing and related services;
- 2.3.c.5. Rental of facilities and equipment;
- 2.3.c.6. Leasing of vehicles;
- 2.3.c.7. Food or lodging;
- 2.3.c.8. Airfare if purchased through a West Virginia-based travel agency or travel company;
- 2.3.c.9. Insurance coverage and bonding if purchased through a West Virginia-based insurance agent; and
- 2.3.c.10. Other direct costs of producing a qualified project in accordance with generally accepted entertainment industry practices.

2.4. "Personal services corporation" means a company that performs services in the field of performing arts, among other fields, and meets ownership and service tests as determined by the Internal Revenue Service.

2.5. "Payroll service company" means a business engaged in outsourcing solutions for human resources, payroll, tax and benefits administration.

2.6. "Loan-out corporation" means a company owned by one or more artists that provide the services of a performing artist to a payroll service company or a third-party production company, i.e., an eligible company for purposes of this statute.

2.7. "Eligible company" means a person or business entity engaged in the business of producing film industry productions.

2.8. "Feature length" means in excess of forty minutes.

2.9. "Federal new markets tax credit program" means the tax credit program codified as Section 45D of the United States Internal Revenue Code of 1986, as amended.

2.10. "Film industry production" means a qualified project intended for reasonable national or international commercial exploitation.

2.11. "Full-time" employees are determined based on employment levels during principal production, rather than pre-production or post-production levels. Since talent and crew work

under different circumstances and work hours vary, industry standards will be taken into consideration when evaluating full-time employees.

2.12. "Performing artist" means a person hired to perform services associated with the artist's particular craft in any department associated with a qualified project.

2.13. "Post-production expenditure" means a transaction that occurs in West Virginia or with a West Virginia vendor after the completion of principal photography, including editing and negative cutting, Foley recording and sound effects, automatic dialogue replacement (also known as ADR or dubbing), special effects or visual effects, including computer-generated imagery or other effects, scoring and music editing, sound editing, beginning and end credits, soundtrack production, subtitling or addition of sound or visual effects; but not including expenditure for advertising, marketing, distribution or expense payments.

2.14. "Qualified project" means a feature length theatrical or direct-to-video motion picture, a made-for-television motion picture, a commercial, a music video, commercial still photography, a television pilot program, a television series and a television mini-series that incurs a minimum of twenty-five thousand dollars in direct production expenditures and post-production expenditures, as defined by this subsection, in West Virginia. The term excludes news or current affairs programming, a weather or market program, an interview or talk show, a sporting event or show, an awards show, a gala, a production that solicits funds, a home shopping program, a program that primarily markets a product or service, political advertising or a concert production.

2.14.a. A qualified project may be produced on any single media or multimedia program that:

2.14.a.1. Is fixed on film, digital medium, videotape, computer disk, laser disc or other similar delivery medium;

2.14.a.2. Can be viewed or reproduced;

2.14.a.3. Is not intended to and does not violate a provision of article eight-c, chapter sixty-one of this code;

2.14.a.4. Does not contain obscene matter or sexually explicit conduct, as defined by article eight-a, chapter sixty-one, of this code;

2.14.a.5. Is intended for reasonable commercial exploitation for the delivery medium used; and

2.14.a.6. Does not contain content that portrays the State of West Virginia in a significantly derogatory manner.

2.15. "Reviewing committee" means a committee consisting of the following persons:

2.15.a The Secretary of the West Virginia Department of Commerce (or designee),

2.15.b The Secretary of the West Virginia Department of Education and the Arts (or designee),

2.15.c The Director of the West Virginia Film Office (or designee),

2.15.d The Commissioner of the West Virginia Division of Tourism (or designee),

2.15.e The Tax Commissioner (or designee) and

2.15.f An additional representative of the West Virginia Film Office to be appointed by the Commissioner of Tourism.

2.16. "Tax Commissioner" means the West Virginia State Tax Commissioner or his or her designee.

### **§110-13X-3. Overview of the Tax Credits.**

3.1. Purpose. – The Statute creates a tax credit program through which an eligible company receives a tax credit for creating qualified projects in West Virginia.

3.2. Establishment of the tax credit. – Upon approval of a credit entitlement by the Film Office, an eligible company may apply for, and the Tax Commissioner shall allow, a nonrefundable tax credit in an amount equal to the percentage specified in this article of:

3.2.a. Direct production expenditures incurred in West Virginia that are directly attributable to the production in West Virginia of a qualified project and that occur in West Virginia or with a West Virginia vendor; and

3.2.b. Post-production expenditures incurred in West Virginia that are:

3.2.b.1. Directly attributable to the production of a qualified project;

3.2.b.2. For services performed in West Virginia.

3.2.c. Expenditures utilized by an eligible company as qualified investment or qualified expenditures for purposes of establishing or calculating the tax credit authorized by this article shall in no event be utilized by the eligible company for the purpose of calculating or qualifying investment for claiming the economic opportunity tax credit authorized by article thirteen-q of this chapter or the manufacturing investment tax credit authorized by article thirteen-s of this chapter.

3.3. Tax credit allowed. – The amount of tax credit allowed to an eligible company shall be:

3.3.a. Base allowance. – The base amount of tax credit shall be twenty-two percent.

3.3.a.1. For taxable years beginning prior to the first day of January, two thousand ten, there shall be an additional credit of five percent.

3.3.b. Extra allowance for hiring of local workers. – The base allowance shall be increased by:

3.3.b.1. An additional four percent if the eligible company, or its authorized payroll service company, employs ten or more West Virginia residents during principal production as part of its full-time employees working in the state or as apprentices working in the state.

3.3.b.2. If the jobs threshold required by W. Va. Code §11-13X-5(b) is met for purposes of entitlement to the four percent extra allowance, then the additional tax credit applies to all expenditures attributable to the qualified project for which the eligible company receives a tax pursuant to this article. It is not limited to costs incurred only during principal production.

3.4. Limitation of the credits. – The tax credits shall be limited as follows:

3.4.a. No more than ten million dollars of the tax credits shall be allocated by the Film Office in any given West Virginia State fiscal year. The Film Office shall allocate the tax credits in the order the eligibility applications therefore are received and approved.

3.4.b. The additional five percent tax credit provided for in section 3.3.a.1. shall not be available with respect to expenditures attributable to the qualified project for which the eligible company receives a tax credit pursuant to the federal new markets tax credit program.

#### **§110-13X-4. Application of the Tax Credit.**

4.1. Application of the tax credit. – The tax credit shall be applied to the eligible company's state tax burden as follows:

4.1.a. Credit allowed. – Beginning in the taxable year that direct production or post-production expenditures are incurred, an eligible company and the owners of an eligible company, are permitted a credit against the taxes imposed in the order specified in this section.

4.1.a.1. Business franchise tax. -- The credit is first applied to reduce the taxes imposed 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 of said article, but before application of any other allowable credits against tax.

4.1.a.2. Corporation net income taxes. -- After application of section 4.1.a.1., any unused credit is next applied to reduce the taxes imposed by W. Va. Code §§ 11-24-1, et seq. for the taxable year, determined before application of other allowable credits against tax.

4.1.a.3. Personal income tax. -- If the eligible taxpayer is an electing small business corporation (as defined in section 1361 of the United States Internal Revenue Code of 1986, as amended), a partnership, a limited liability company that is treated as a partnership for federal income tax purposes or a sole proprietorship, then any unused credit is allowed as a credit against the taxes imposed by W. Va. Code §§ 11-21-1, et seq. on the

income from business or other activity subject to tax under W. Va. Code §§ 11-23-1, et seq. or on income of a sole proprietor attributable to the business.

Electing small business corporations, limited liability companies, partnerships and other unincorporated organizations shall allocate the credit allowed by W. Va. Code §§ 11-13X-1, et seq. among its members in the same manner as profits and losses are allocated for the taxable year.

**§110-13X-5. Requirements for Tax Credit; Application for Tax Credit.**

5.1. In order for any eligible company to claim a tax credit under this W. Va. Code §§ 11-13X-1, et seq., it shall comply with the following requirements:

5.1.a. Each qualified project must incur a minimum of twenty-five thousand dollars in expenditures in West Virginia or with a West Virginia vendor.

5.1.b. If the qualified project contains production credits, the eligible company shall agree, upon request by the Film Office, to recognize the State of West Virginia with the following acknowledgement in the end credit roll: "Filmed in West Virginia with assistance of the West Virginia Film Industry Investment Act";

5.1.c. Apply to the Film Office on forms and in the manner the Film Office may prescribe.

5.1.c.1. The eligible company shall submit to the Film Office one (1) completed West Virginia Film Industry Investment Act eligibility application, with original signatures and attachments. The eligible company should submit an eligibility application as far in advance as possible prior to the first expenditure in West Virginia. However, an eligible company may choose to submit an application at any time during production or after production. But the applicant runs the risk of there being no tax credits remaining under the statutory maximum. The reviewing committee may deny the application if it does not meet all eligibility requirements. Qualified costs incurred prior to the approval of an application are eligible for the incentive if there are tax credits remaining within the ten million dollar cap at the time of approval.

5.1.c.2. The application shall include, but not be limited to:

5.1.c.2.A. A completed West Virginia Film Industry Investment Act eligibility application;

5.1.c.2.B. A copy of the script, or, for commercials, music videos or commercial still photography a copy of the storyboards or shot lists;

5.1.c.2.C. Proof or status of financing or distribution arrangements;

5.1.c.2.D. A copy of the budget top sheet, which contains a dedicated column that identifies estimated direct production expenditures and post-production expenditures that will be incurred in West Virginia;

5.1.c.2.E. Signature and verification by the applicant or by a duly authorized representative of the applicant;

5.1.c.2.F. The full legal name and tax identification number of the applicant;

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

5.1.c.2.H. A certified copy of its certificate of incorporation, articles of organization, or other similar documents that verify applicant is in good standing and registered to do business in the state of West Virginia.

5.1.d. Application forms may be obtained from the West Virginia Film Office.

5.1.e. ~~Upon award of a tax credit approval of an eligibility application,~~ eligible company must begin production within one hundred twenty (120) days of ~~issuance of the tax credit voucher or certificate approval,~~ or shall otherwise forfeit the right to claim any tax credit for the approved qualified project. Such forfeiture does not preclude the eligible company from resubmitting an eligibility application for the same project at a future date. Upon written request by the eligible company, and prior to the expiration of the one hundred twenty (120) day deadline, the reviewing committee may extend the deadline at its discretion.

5.2. The applicant shall submit to the Film Office information required by the Film Office to demonstrate conformity with the requirements of this section and shall agree in writing:

~~5.2.e.1.~~ 5.2.a. To pay all obligations the eligible company has incurred or will in future incur in West Virginia;

~~5.2.e.2.~~ 5.2.b. To publish, at completion of principal photography, a notice at least once a week for three consecutive weeks in local newspapers in regions where filming or production has taken place to notify the public of the need to file creditor claims against the eligible company by a specified date;

~~5.2.e.3.~~ 5.2.c. That outstanding obligations are not waived should the creditor fail to file by the specified date; and

~~5.2.e.4.~~ 5.2.d. To delay filing a claim for the tax credit authorized by this article until the Film Office delivers written notification to the Tax Commissioner that the eligible company has fulfilled all requirements for the credit.

~~5.2.d~~ 5.2.e. Each allocation year stands on its own. It is necessary for a project sponsor to file a new application for each year in order to be considered for credit allocation in each specific year. Projects are approved on a first come, first served basis. The maximum amount of project tax credit for any taxable year is the amount allocated by the Film Office through the project review and certification process.

5.3. Upon completion of a qualified project, the eligible company shall:

5.3.a. File all required West Virginia tax reports and returns for all applicable tax years and pay any balance of West Virginia tax due;

5.3.b. All claims for the tax credit shall be filed with an expense verification report prepared by an independent certified public accountant licensed to practice in the United States, utilizing "Agreed Upon Procedures" which are prescribed by the Film Office in accordance with generally accepted auditing standards in the United States. The certified public accountant will render a report as to the qualification of the credits, consistent with guidelines to be determined by the Film Office and approved by the Tax Commissioner; and

5.3.c. An eligible company claiming an extra allowance for employing local workers shall submit to the Film Office documentation verifying West Virginia residency for all individuals claimed to qualify for the extra allowance. The documentation shall include the name, home address and telephone number for all individuals used to qualify for the extra allowance.

5.4 Disqualification. The Film Office may disqualify in whole or in part any investment or expenditure from eligibility for tax credit if it appears that the economic substance of an expenditure is not for services substantially rendered in West Virginia, or is for the purchase or lease of tangible personal property not used or operated in West Virginia or is for purchases or leases of realty not located in West Virginia.

5.4.a The Film Office may disqualify in whole or in part any investment or expenditure from eligibility for tax credit if it appears that the economic substance of an expenditure or transaction constitutes self dealing or an expenditure or investment primarily directed to or received by the purchaser or investor, or by an alter ego of the purchaser or investor or by a related person related to the purchaser or investor or by a member of the same controlled group as the controlled group to which the purchaser or investor belongs.

5.4.b For purposes of this rule, the term "controlled group" means one or more chains of corporations connected through stock ownership with a common parent corporation, if stock possessing at least fifty percent of the voting power of all classes of stock of each of the corporations is owned directly or indirectly by one or more of the corporations; and the common parent owns directly stock possessing at least fifty percent of the voting power of all classes of stock at least on of the other corporations.

5.4.c. For purposes of this rule, the term "related person" means a corporation, partnership, association or trust controlled by the taxpayer; or an individual, corporation, partnership, association or trust that is in control of the taxpayer.

5.4.d. For purposes of this rule the singular case as used in this section 5.4 et seq. includes the plural and vice versa, as circumstances may dictate;

5.4.e. For purposes of this rule, the terms "taxpayer," "purchaser," and "investor" mean and include any person or entity seeking to establish entitlement to the tax credit addressed in this rule, or any person or entity making expenditures, or making investment or making purchases for which the purchaser, investor or taxpayer purports to directly or indirectly establish entitlement to the tax credit.

5.4.f. For purposes of this rule, an entity or person is presumed to be an alter ego, nominee or instrumentality of another person, entity or business if:

5.4.f.1, More than twenty percent of the real assets or more than twenty percent of the operating assets or more than twenty percent of the tangible personal property of one person, entity or business are or have been transferred to the other person, entity or business, or are or have been used in the operations of the other person, entity or business, or more than twenty percent of the real assets or more than twenty percent of the operating assets or more than twenty percent of the tangible personal property of one business are or have been used to collateralize or secure debts or obligations of the other person, entity or business.

5.4.f.2, Ownership of the persons, entities or businesses is so configured that the attribution rules of either Internal Revenue Code section 267 or Internal Revenue Code section 318 would apply to cause ownership of the persons, entities or businesses to be attributed to the same person, entity or business; or

5.4.f.3, Substantive control of the persons, entities or businesses is held or retained by the same person, entity or business, directly or indirectly, or through attribution under section 5.4.f.2 of this rule.

5.5. If the requirements of this section have been complied with as determined by the Film Office, the Film Office shall approve the tax credit and issue to the Tax Commissioner a document granting the appropriate tax credit to the eligible company.

#### **§110-13X-6. Application Receipt and Review.**

6.1. The Film Office shall determine and report to the Tax Commissioner in a manner and at times the Film Office and the Tax Commissioner shall agree upon:

6.1.a. The eligibility of the company and a proposed project;

6.1.b. The maximum amount of the tax credit available to the eligible company based on estimated "direct production expenditures" and "post-production expenditures."

6.2. The Film Office shall reserve tax credits for an eligible company by:

6.2.a. Reserving the credits to eligible companies in the order in which eligibility applications are received and approved by the Film Office;

6.2.b. Ensuring that the amount of reserved and allocated credits for the given year does not exceed the maximum available credit as limited by statute.

6.2.c. By notifying the eligible company, in writing, of the amount of credits that have been reserved for the eligible company and providing copies of the notification to the Tax Commissioner.

6.3. The Film Office shall receive eligibility applications on a first-come, first served basis



during regular business hours beginning on and after January 1, 2008. The Film Office shall record the time and date of receipt of an eligibility application.

6.4. The Film Office shall review all eligibility applications in the order of their receipt to determine if each application is complete. When it is determined that an eligibility application is complete, the reviewing committee will, in the orderly course of business, review the applications in the order of their receipt to determine if the applicant and the proposed project meet the eligibility requirements to apply for the tax credit. The reviewing committee's determination shall be made within thirty (30) days of the eligibility application's receipt. The eligibility application shall be considered received, for purposes of the time requirements set forth herein, and for purposes of assigning a queue position to the application for review by the reviewing committee, when the application is physically received by the Film Office.

6.5. In the event the Film Office determines an eligibility application to be incomplete, the Film Office 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 eligibility application after correcting the deficiencies stated in the notice, but the amended resubmitted eligibility application must be received by the Film Office within twenty (20) days after the Film Office sends the notice, in order for the application to be ~~considered~~ maintain its initial position in the queue. Any amended application that is received by the Film Office more than twenty (20) days after the Film Office sends the notice may, within the sole discretion of the Film Office, be denied further consideration or may be added to the queue based on the actual date of physical receipt of the amended resubmitted application by the Film Office.

~~6.5.a. If an eligibility application, though incomplete, is designated by the Film Office as "substantially complete" as determined in the sole discretion of the Film Office, and if the amended resubmitted application is received within the twenty (20) day requirement set forth herein, then the time of receipt of the amended resubmitted eligibility application, for the limited purposes of the queue position of the application for review by the reviewing committee, shall be considered to be the time of receipt of the initial eligibility application. However, if the time of receipt of the amended resubmitted application is more than twenty (20) days after the Film Office sends the notice, the applicant's place in the queue is forfeited, and the resubmitted application may, within the sole discretion of the Film Office, be denied further consideration or may be added to the queue based on the actual date of physical receipt of the amended resubmitted application by the Film Office.~~

~~6.5.b. If an eligibility application is not "substantially complete" as determined in the sole discretion of the Film Office, the applicant is required to amend and resubmit the application. And if the amended resubmitted application is received within the twenty (20) day requirement set forth herein, then the time of receipt of the amended resubmitted eligibility application, for all purposes, including the queue position of the application for review by the reviewing committee, shall be the actual time of physical receipt of the amended resubmitted eligibility application by the Film Office. However, if the time of receipt of the amended resubmitted application is more than twenty (20) days after the Film Office sends the notice, the resubmitted application may, within the sole discretion of the Film Office, be denied further consideration or may be added to the queue based on the actual physical date of receipt of the amended resubmitted application by the Film Office.~~

6.6. Requests for Increase in Tax Credit Allocation. – If an eligible company seeks an

increase in the amount of tax credits for an approved qualified project, the eligible company must submit an application for modification to the Film Office, which must be submitted by and bear the same signature as the person who submitted the original eligibility application, or a duly authorized representative. Requests for an increase will be placed in the order of receipt of all applications, will be assigned a new application number and will be reviewed separately from the original eligibility application. The reviewing committee shall consider such application at its next scheduled meeting, but within thirty (30) days of receipt, and may request additional information from applicant to assist in its evaluation of the request. Approval will be determined using the same criteria of the review process and based on the availability of any remaining credits for the fiscal year the request is received. The eligible company will be notified in writing of the reviewing committee's decision.

6.7. Other Revisions to Application. – If an eligible company seeks to revise its original eligibility application for a qualified project for reasons other than those identified in 6.6 of this rule, the eligible company must submit an application for modification to the Film Office, which must be submitted by and bear the same signature as the person who submitted the original eligibility application, or a duly authorized representative. The reviewing committee shall consider such application at its next scheduled meeting, but within thirty (30) days of receipt, and may request additional information from applicant to assist in its evaluation of the request. Approval will be determined using the same criteria of the review process. The eligible company will be notified in writing of the reviewing committee's decision.

~~6.6.~~ 6.8. False Information. – Upon the submittal of any false or misleading information by an applicant, the Film Office may reject the application and deny further consideration of the applicant for qualification in that and subsequent fiscal years.

~~6.7.~~ 6.9. Complete Application. – Upon a determination by the Film Office that an eligibility application is complete, the Film Office shall place the complete application on the agenda of the next duly or regularly scheduled meeting of the reviewing committee. Complete applications shall be placed on the agenda in the order of their receipt by the Film Office.

~~6.8.~~ 6.10. Action of reviewing committee. – The allocation of all tax credits under this Rule must be approved by the reviewing committee. The reviewing committee shall consider all completed applications in the order they are placed on the agenda. Once an applicant and a project described in an eligibility application have been determined by the reviewing committee to meet the eligibility requirements of the Statute and Rule, the Film Office shall notify the Tax Commissioner in writing of the eligibility of the company and the project and the maximum amount of the tax credit to be reserved for the eligible company.

**§110-13X-7. Uses of Credit; unused credit; carry forward; carry back prohibited; expiration and forfeiture of credit.**

7.1. No credit is allowed under this section against any employer withholding taxes imposed by article twenty-one, of this chapter.

7.2. If the tax credit allowed under W. Va. Code §§ 11-13X-1, et seq. in any taxable year exceeds the sum of the taxes enumerated in W. Va. Code §11-13X-7 for that taxable year, the excess may be applied against those taxes, in order and manner stated in W. Va. Code § 11-13X-7, for succeeding taxable years until the earlier of the following:

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

7.2.b. The expiration of the second taxable year after the taxable year in which the expenditures were occurred incurred. The tax credit remaining thereafter is forfeited; or

7.2.c. The excess tax credit not otherwise expired or forfeited is transferred or sold.

7.3. No carry back to a prior taxable year is allowed for the amount of any unused portion of any annual credit allowance.

7.4. The transfer or sale of this credit does not extend the time in which the credit can be used. The carry forward period for credit that is transferred or sold begins on the date on which the credit was originally granted by the Film Office.

7.4.a. Current year West Virginia tax returns need not be filed prior to the transfer of film credit by an eligible transferor.

7.5. Any tax credit certificate or voucher issued in accordance with this article, which has been issued to an eligible company, and to the extent not previously claimed against the tax of the eligible company or the owner of the certificate, may be transferred or sold by such eligible company or owner of the certificate to another West Virginia taxpayer, subject to the following conditions:

7.5.a. A single transfer or sale may involve one or more transferees, assignees or purchasers. A transfer or sale of the credits may involve multiple transfers to one or more transferees, assignees, or purchasers;

7.5.b. Transferors and sellers shall apply to the Film Office for approval of any transfer, sale or assignment of the tax credit. Any amount of the tax credit that has been transferred or assigned shall be subject to the same limitations and conditions that apply to the eligible company's or seller's entitlement, use and application of the credit. The application for sale, transfer or assignment of the credit shall include the transferor's tax credit balance prior to transfer, the credit certificate number, the name of the seller, the transferor's remaining tax credit balance after transfer, if any, all tax identification numbers for both transferor and transferee, the date of transfer, the amount transferred, a copy of the credit certificate and any other information required by the Film Office or the ~~tax credit~~ Tax Commissioner.

7.5.c. The Tax Commissioner shall not approve the transfer or assignment of a tax credit to a taxpayer if the seller or transferor has an outstanding tax obligation with the State of West Virginia for any prior taxable year.

7.6. The transferee, assignee or purchaser shall apply such credits as authorized in West Virginia Code § 11-13X-1 *et seq.*

7.7. For purposes of this chapter, any proceeds received by the eligible company or transferor for its assignment or sale of the tax credits allowed pursuant to this section are excepted from the West Virginia consumers sales and service tax and use tax as a sale or

transfer of an intangible, and will not be subject to corporate net income tax and personal income tax..

7.8. Tax credits will be subject to recapture, elimination or reduction if it is determined by the Tax Commissioner that a taxpayer was not entitled to the credit, in whole or in part, in the tax year in which it was claimed by the taxpayer. In the event of a transfer or sale of unused credit, the duty of compliance with all applicable statutes and rules relating to application and use of the credit, including any liability for recomputation or recapture of the credit, first falls on the seller or transferor, rather than the presumed innocent buyer, or credit transferee. However, both the seller and the buyer are jointly and severally liable for any statutory violations relating to entitlement, use and application of the credit and any recomputation or recapture thereof.

7.9. Failure to comply with this section will result in the disallowance of the tax credit until the taxpayers are in full compliance.

7.10. Should an approved qualified project fail to begin production within the time specified in section 5.1.e. of these rules, the eligible company shall forfeit the right to claim any tax credit for the approved qualified project and the Film Office shall release the reserved credit and cause it to be available for the next eligible qualified project in the queue for approval. Such forfeiture does not preclude the eligible company from resubmitting an application for the same project at a future date.

#### **§110-13X-8. Uses of credit; transferability.**

8.1. The tax credit may be applied to reduce taxes imposed by articles twenty-three (business franchise tax), twenty-four (corporate net income tax) and twenty-one (personal income tax) of Chapter 11 of the West Virginia Code in the tax year the investment is placed in service after approval of the project by the Film Office (with potential carry forward for an additional 2 years). The credit may be taken into account in computing estimated payments.

8.2 In the event of a transfer or sale of unused credit, the duty of compliance with all applicable statutes and rules relating to application and use of the credit, including any liability for recomputation or recapture of the credit, first falls on the seller or transferor, rather than the presumed innocent buyer, or credit transferee. However, both the seller and the buyer are jointly and severally liable for any statutory violations relating to entitlement, use and application of the credit and any recomputation or recapture thereof.

8.3 After approval by the Film Office of any transfer, sale or assignment of the tax credit, pursuant to W.Va. Code §11-13X-8, the transferee shall acquire the amount of credit that remains available under that article. The transferor and the transferee or transferees may apply the credit against tax in the year of the transfer, and succeeding years in accordance with the amount of credit to which each is entitled, but the dollar amount of credit available to each shall not be exceeded or duplicated.

#### **§110-13X-9. Burden of proof.**

9.1. The burden of proof is on the eligible company or credit transferee claiming the credit

allowed by this article to establish by clear and convincing evidence that the eligible company or transferee is entitled to the amount of credit asserted for the taxable year.

**§110-13X-10. Tax credit review and accountability.**

10.1. Pursuant to the requirements of West Virginia Code §11-13X-11, beginning on the first day of the third taxable year after the passage of W. Va. Code §§ 11-13X-1, *et seq.* and every two years thereafter, the Film Office 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 West Virginia Film Industry Investment Act during the most recent two-year period for which information is available. The criteria to be evaluated shall include, but will not be limited to, for each year of the two-year period:

- 10.1.a. The number of eligible companies claiming the credit;
- 10.1.b. The dollar amount of tax credit certificates issued to taxpayers;
- 10.1.c. The number of new businesses created by the tax credit;
- 10.1.d. The number of new jobs, if any, created by the tax credit;
- 10.1.e. The amount of direct expenditures made on qualified projects; and
- 10.1.f. The cost of the credit.

10.2. Eligible companies claiming the credit shall provide any information the Tax Commissioner and the Film Office may require to prepare the report: The information provided is subject to the confidentiality and disclosure provisions of the West Virginia Tax Procedure and Administration Act. West Virginia Code §11-10-1 *et seq.* However, notwithstanding the provisions of West Virginia Code §§11-10-5d and 5s, the Tax Commissioner is authorized to disclose to the Film Office such tax information as may be necessary to compile the records, reports and recommendations required by and section 12 of this rule and by West Virginia Code §§11-13X-11 and 12. The Film Office is hereby designated by the Tax Commissioner as a "person having a material interest" in such information in accordance with the provisions of West Virginia Code §11-10-5d(f).

**§110-13X-11. Confidentiality.**

11.1. All information submitted to the Tax Commissioner and the Film Office is confidential and not subject to public disclosure when filed with the Film Office or Tax Commissioner except as otherwise provided in this rule or the West Virginia Code.

11.2. All information submitted to the Film Office pursuant to an eligibility application for designation as an eligible company and documents related to the application, are confidential and not subject to public disclosure, as specified herein, when filed with the Film Office, except the following in accordance with West Virginia Code §11-13X-11:

- 11.2.a. The full legal name of the applicant;

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

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

11.3. All records and documentation relating to application, evaluation or qualification of a company or a project for the tax credit authorized under West Virginia Code §11-13X-1 *et seq.* is tax information subject to the confidentiality restrictions of the West Virginia Tax Procedure and Administration Act, West Virginia Code §11-10-1 *et seq.*, including, but not limited to, the provisions of West Virginia Code §11-10-5d.

11.4. Such confidential information, relating to application, evaluation or qualification of a company or a project, including general correspondence to or from the Film Office, or to or from the West Virginia Tax Department, including information generated internally by the Film Office or Tax Department, including but not limited to, internal memoranda and reports, is confidential and not subject to public disclosure, unless otherwise provided by statute or rule.

11.5. 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 the West Virginia Tax Procedure and Administration Act, or W. Va. Code §11-10-5s or West Virginia Code §11-13X-1 *et seq.* .

#### **§110-13X-12. Economic Development.**

12.1. The West Virginia Film Office, in consultation and coordination with appropriate public and private entities, shall promote, foster, encourage and monitor the development of the film industry in this state as part of its comprehensive economic development strategy for West Virginia and report recommendations for expanding the industry in the state to the Governor and Joint Committee on Government Finance annually on or before the first day of December.

#### **§110-13X-13. General Procedure and Administration.**

13.1. Requirements to Claim the Tax Credit. – To claim a tax credit, the eligible company shall comply with the Statute and this Rule and shall timely provide complete and accurate forms, returns, schedules and other information required by the Tax Commissioner or Film Office.

13.2. 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 provides for administration of those taxes.

13.3. Maintenance of Records. - An eligible company 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.

**§110-13X-14. Effective date.**

14.1. The credit allowed by W. Va. Code §§ 11-13X-1, et seq. shall be allowed upon eligible expenditures occurring after the thirty-first day of December, two thousand seven.

14.2. The amendments to this article enacted in the year two thousand eight shall apply to all taxable years beginning after the thirty-first day of December, two thousand seven, and shall apply with retroactive effect with relation to taxable years beginning prior to the date of passage of such amendments.

Rec'd  
after  
filing  
10:00 AM  
deadline.

handout 10/12/08



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**RECEIVED**

AUG 29 2008

SECRETARY OF  
REVENUE

August 27, 2008

Virgil T. Helton  
Legal Division  
State Tax Department  
P.O. Box 1005  
Charleston, WV 25324-1005

Dear Mr. Helton,

Upon review of §§110 C.S.R., Series 13X of the West Virginia Film Industry Investment Act, we have identified the following items for comment:

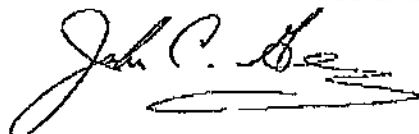
1. §§110-13x-2.3 states that a *direct production expenditure means a transaction that occurs in the state of West Virginia or with a West Virginia vendor* – We seek additional clarification regarding what criteria must be met in order for a transaction to be deemed to have occurred in the state of West Virginia and what criteria qualify a vendor to be a qualified West Virginia vendor?
2. §§110-13x-2.3.a states that *payment of wages, fringe benefits or fees for talent, management or labor to a person who is a resident of West Virginia would qualify for a tax credit*. Would payments to non-residents of West Virginia be qualified expenses if incurred in and are subject to West Virginia income tax? §§110-13x-2.3.b indicates that payments to non-residents would qualify for the credit in certain circumstances if made through a personal service corporation. We respectfully recommend that payments to individuals for services be treated consistently whether the payments are made to the individual directly or through a personal service corporation. In addition we ask that the state of West Virginia give consideration as to the procedures they will require an independent CPA to perform in order to verify residency status in the process of completing the required agreed upon procedures as required by this act.



3. §§110-13x-2.3c.10 -- states that *other direct costs for producing a qualified project in accordance with generally accepted entertainment industry practices*. We seek additional clarification as to the meaning of this statement and request that consideration be given to providing specific examples of other direct costs for producing a qualified project in accordance with generally accepted entertainment industry practices. In addition we request that the term *generally accepted entertainment industry practices* be defined.
4. §§110-13x-3.2.c -- We seek additional clarification regarding this paragraph as we are uncertain as to the restriction of the Film Industry Incentive it creates.
5. §§110-13x-7.8 -- 8.2 indicate that the transfer of any tax credits issued under this act create the buyer to be *jointly and severally liable for any statutory violations relating to entitlement*. We respectfully recommend that the transfer of the credit to a good faith buyer be made without any recapture provisions. It is our experience with the transfer of tax incentives that such a requirement causes the transfer to occur at an increased discount. The increased discount creates a decrease in the effectiveness of the incentive program.
6. Are the accounting fees paid by an eligible company for the purpose of performing the agreed upon procedures required by this act qualified expenses for purposes of calculating the credit? If the fees do qualify, what criteria would be used in determining what connection the CPA firm must have with the state of West Virginia in order for the expense to qualify?

If you have any questions regarding this letter or would like to discuss any of these points further, please do not hesitate to contact me or my associate, Blair Robbins at (732) 919-1400.

Respectfully yours,  
AMPER, POLITZNER & MATTIA, LLP  
Certified Public Accountants & Consultants



John C. Genz, CPA, MST  
Partner

October 12, 2008

## States' Film Production Incentives Cause Jitters

By MICHAEL CIEPLY

LOS ANGELES — Already on the hook for billions to bail out Wall Street, taxpayers are also finding themselves stuck with a growing tab for state programs intended to increase local film production.

One of the most shocking bills has come due in Louisiana, where residents are financing a hefty share of Brad Pitt's next movie — \$27,117,737, to be exact, which the producers will receive by cashing or selling off valuable tax credits.

As the number of movies made under these plans multiplied in recent years, the state money turned into a welcome rescue plan for Hollywood at a time when private investors were fleeing the movies. But the glamour business has not always been kind to those who pick up the costs, and states are moving to rein in their largess that has allowed producers to be reimbursed for all manner of expenditures, whether the salaries of stars, the rental of studio space or meals for the crew.

Louisiana, one of the most assertive players in the subsidy game, wound up covering that outsize piece of the nearly \$167 million budget of Mr. Pitt's "The Curious Case of Benjamin Button" — the state's biggest movie payout to date — when producers for Paramount Pictures and Warner Brothers qualified the coming movie, a special-effects drama, under an incentive that has since been tightened. Separately, Louisiana's former film commissioner is set to be sentenced in January to as much as 15 years in federal prison for taking bribes to inflate film budgets (though not that of "Button") and, hence, pay higher subsidies.

Michigan, its own budget sagging, is in the middle of a hot political fight over a generous 40 percent rebate on expenditures to filmmakers that was carried out, with little opposition, only last April. Producers of films for studios like Warner Brothers and the Weinstein Company rushed to cash in, just as homegrown businesses were squeezed by a new business tax and surcharge. Rebellious legislators from both parties are now looking to put a cap on the state's annual film spending, which some have estimated could quickly hit \$200 million a year.

In Rhode Island, meanwhile, the rules have toughened considerably. That happened after The Providence Journal reported in March that producers of a straight-to-DVD picture called "Hard Luck," which starred Wesley Snipes and Cybill Shepherd, had picked up \$2.65 million in state tax credits on a budget of \$11 million, even though it had reported paying only \$1.9 million of the total to Rhode Islanders.

"With this much money involved, there's going to be a temptation to hype budgets," said Peter Dekom, a veteran entertainment business lawyer who is an adviser to New Mexico's incentive program.

The vogue for state film subsidies appears to have started in Colorado early this decade, with a briefly financed Defense Against Canada law that was devised to win production back from Vancouver and Toronto. Louisiana and New Mexico soon came on board.

By this year, about 40 states were offering significant subsidies, turning the United States into what the Incentives

Office, a consulting firm in Santa Monica, Calif., has called the New Bulgaria. It is a reference to what was once the film industry's favorite low-cost production site.

Virtually all of the programs use a state tax system to reimburse producers for money spent on movies or TV shows shot in the state. Some, like Michigan's, simply refund a percentage of expenditures to the producer. Others, like Louisiana's, issue a tax credit that can reduce the taxes a production pays or be sold to someone else. Either way, the state gives up revenue that otherwise would be collected to put money in the producer's pockets.

Advocates, of course, argue that these programs create jobs.

One of the country's most successful programs is in New Mexico, which has backed movies like the Oscar-winning "No Country for Old Men" and next year's "Terminator Salvation," the latest sequel in the action series, with a reported budget of \$200 million.

New Mexico officials boast of having used a 25 percent production cost rebate to build a local film industry that has attracted more than \$600 million in direct spending since 2003, and an estimated \$1.8 billion in total financial impact, as of last June. And in fiscal year 2008, the productions in the state generated 142,577 days of employment, up from 25,293 in 2004.

Elsewhere, however, critics have sharply challenged the notion that state subsidies for the film business can ever buy more than momentary glitter.

"There's no evidence yet that this is a particularly efficient or effective way to create jobs," said Noah Berger, executive director of the Massachusetts Budget and Policy Center.

The nonprofit center reviews budget and tax policies in Massachusetts, which is spending about \$60 million a year on producer credits. A recent study by Mr. Berger's center pointed out that the state's film credit, at 25 percent, is five times higher than that offered to those who build in designated economic opportunity areas, and more than eight times the state's standard investment tax credit.

Until two years ago, Louisiana's program offered a 15 percent credit for virtually the entire budget of a qualified film (and more for Louisiana resident wages), including money that may have been spent out of state. Things were fast and loose enough in Louisiana that Mark Smith, who oversaw the program, pleaded guilty last year to taking \$67,500 in bribes to inflate budgets for a film production company that was not named by the authorities.

Kathy English, a spokeswoman for the United States attorney's office in New Orleans, said the case remained open.

Louisiana's new rules offer a larger credit, but only on spending within the state. That made the incentive less attractive for big-budget movies, like "Button," which was done under old rules, and could recover parts of star salaries and other expenses that left Louisiana. But it has drawn a welter of smaller movies and TV shows, 70 of which have been shot so far in 2008, up from 56 the year before.

"Areas of the state have prospered as a result; everyone sees it," said Sherri McConnell, director of Louisiana's Office of Entertainment Industry Development. (Ms. McConnell said she did not expect to have a detailed picture of economic impact until the completion of a planned study, early next year.)

Others are not so sure. "There's no way you can say this makes money for the public" treasury, said Greg Albrecht,

chief economist for Louisiana's legislative fiscal office.

In 2006, the last year for which it has complete figures, the state granted about \$121 million in credits. Mr. Albrecht estimates that only about 18 percent of that is ever recovered in taxes on expanded economic activity.

"It's an expensive way to create jobs," Mr. Albrecht said. But he noted that Louisiana, like New Mexico, can afford it, thanks to rising oil and gasoline revenue. "We're happy as larks right now to do this."

Not so happy are some folks up in Michigan, where a State Senate committee recently moved to cap the state's film rebates at an aggregate of \$50 million a year.

"It's just horrible right now," Mike Bishop, a Republican state senator, said of Michigan's financial condition. Mr. Bishop initially backed the film incentive. But he grew alarmed at outlays that he estimated could quickly exceed \$110 million a year to subsidize movies like "Gran Torino," directed by [Clint Eastwood](#), and "Youth in Revolt," a comedy by the filmmaker [Miguel Arteta](#).

Anthony Wenson, chief operating officer of the Michigan Film Office, said the actual amount of credits granted was only about \$25 million so far. The annual number is impossible to reckon, he said, because plans for future projects are in flux.

In any case, Nancy Cassis, another Republican who was the only Michigan senator to oppose the incentives when they began last spring, said she expected to see them capped with bipartisan backing later this year. And she does not look for Hollywood to hang around when the money dries up.

"These are not long-term jobs," Ms. Cassis said. "If just one state offers more, they'll be out of here before you can say 'lickety-split.'"

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**OCTOBER 14**

Tuesday, October 14, 2008

3:00 p.m. to 5:00 p.m.

Legislative Rule-Making  
Review Committee  
(Code §29A-3-10)

Earl Ray Tomblin  
ex officio nonvoting member

Richard Thompson  
ex officio nonvoting member

**Senate**

**House**

Minard, Chairman  
Fanning, Vice Chair      Absent  
Prezioso  
Unger  
Boley                      Absent  
Facemyer                  Absent

Brown, Chairman  
Miley, Vice Chair      Absent  
Burdiss  
Talbott  
Overington  
Sobonya

The meeting was called to order by Ms. Brown, Co-Chair.

The minutes of the October 12, 2008, meeting were approved.

Debra Graham, Chief Counsel, explained her abstract on the rule proposed by the **WV Department of Agriculture, Animal Disease Control, 61CSR1**, and stated that the Department has agreed to technical modifications.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham reviewed her abstract on the rule proposed by the **WV Department of Health and Human Resources, Public Water Systems, 64CSR3**, and stated that the Department has agreed to technical modifications.

Ann Spaner with the Bureau for Public Health responded to questions from the Committee.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham explained her abstract on the rule proposed by the **WV Department of Health and Human Resources, Tuberculosis Testing, Control, Treatment and Commitment, 64CSR76**, and stated that the Department has agreed to technical modifications.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Ms. Graham reviewed her abstract on the rule proposed by the **Division of Motor Vehicles, Collection on the Tax on the Sale of a Vehicle, 91CSR9**, stated that the Department has agreed to technical modifications and responded to questions from the Committee.

Steve O. Dale with the Division of Motor Vehicles responded to questions from the Committee.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Charles Roskovensky, Associate Counsel, explained his abstract on the rule proposed by the **WV Board of Respiratory Care, Student Temporary Permits, 30CSR9**, and stated that the Board has agreed to technical modifications.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Roskovensky reviewed his abstract on the rule proposed by the **WV Board of Social Work Examiners, Fee Schedule, 25CSR3**.

Judith Williams with the Board of Social Work Examiners responded to questions from the Committee.

Mr. Minard moved that the proposed rule be approved. The motion was adopted.

Mr. Roskovensky explained his abstract on the rule proposed by the **West Virginia Board of Medicine, Establishment and Regulation of Restricted License Issued to an Applicant in Extraordinary Circumstances, 11CSR2**, stated that the Board has agreed to technical modifications and responded to questions from the Committee.

Debra Rodecker, Counsel for the Board of Medicine, responded to questions from the Committee.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Roskovensky reviewed his abstract on the rule proposed by the **West Virginia Board of Physical Therapy, General Provision, 16CSR1**, stated that the Board has agreed to technical modifications and responded to questions from the Committee.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Roskovensky explained his abstract on the rule proposed by the **WV Commission for the Deaf and Hard of Hearing, Establishment of Required Qualifications and Ethical Standards for Interpreters and Transliterators, 192CSR3**, and stated that the Board has agreed to technical modifications.

Roy Forman, Interim Director, with the Commission for the Deaf and Hard of Hearing, responded to questions from the Committee.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Jay Lazell, Associate Counsel, reviewed his abstract on the rule proposed by the **Department of Environmental Protection - Office of Waste Management, Hazardous Waste Management System, 33CSR20**, and stated that the Office has agreed to technical modifications.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Mr. Lazell explained his abstract on the rule proposed by the **Department of Environmental Protection - Division of Water and Waste Management, Assessment of Civil Administrative Penalties, 33CSR22**, and stated that the Division has agreed to technical modifications.

Ray Frank, General Counsel, with the Department of Environmental Protection responded to questions from the Committee.

Ms. Sobonya moved that the proposed rule lie over until the next meeting. The motion was adopted.

Mr. Lazell reviewed his abstract on the rule proposed by the **Department of Environmental Protection - Division of Water and Waste Management, Hazardous Waste Management Fee, 33CSR24**, stated that the Division has agreed to technical modifications and responded to questions from the Committee.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.

Terrie Sangid, Assistant Director of the Division of Water and Waste Management, responded to questions from the Committee.

Mr. Frank responded to questions from the Committee.

Mr. Minard moved that the proposed rule be approved as modified. The motion was adopted.



Mr. Lazell explained his abstract on the rule proposed by the **Department of Environmental Protection - Division of Water and Waste Management**, Assessment of Civil Administrative Penalties, 47CSR56, and stated that the Division has agreed to technical modifications.

Mr. Minard moved that the proposed rule lie over until the next meeting. The motion was adopted.

Mr. Minard moved to adjourn. The motion was adopted.

OCTOBER INTERIM ATTENDANCE  
Legislative Interim Meetings  
October 12, 13 and 14, 2008

Tuesday, October 14, 2008

3:00 pm - 5:00 pm

Legislative Rule-Making Review Committee

Earl Ray Tomblin, ex  
officio nonvoting member

Thompson, ex  
officio nonvoting member

Senate

Minard, Chair  
Fanning, Vice Chair  
Prezioso  
Unger,  
Boley  
Facemyer

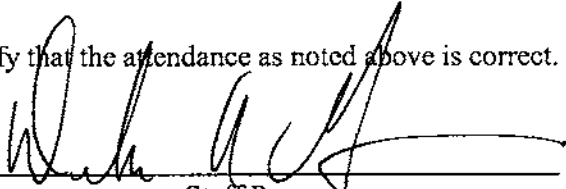
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House

Brown, Chair  
Miley, Vice Chair  
Burdiss  
Talbot  
Overington  
Sobonya

\_\_\_\_\_  
✓  
\_\_\_\_\_  
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\_\_\_\_\_  
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I certify that the attendance as noted above is correct.

  
\_\_\_\_\_  
Staff Person

Debra Graham

Please return to Brenda in Room 132-E or Fax to 347-4819 ASAP, due to payroll deadline.

**TENTATIVE AGENDA**  
**LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**  
**Tuesday, October 14, 2008**  
**3:00 p.m. to 5:00 p.m.**  
**Senate Judiciary Committee Room**

**1. Review of Legislative Rules:**

- a. **Agriculture, WV Department of**  
*Animal Disease Control*  
61CSR1
- b. **Health and Human Resources, WV Department of**  
*Public Water Systems*  
64CSR3
- c. **Health and Human Resources, WV Department of**  
*Tuberculosis Testing, Control, Treatment and Commitment*  
64CSR76
- d. **Motor Vehicles, Division of**  
*Collection on the Tax on the Sale of a Vehicle*  
91CSR9
- e. **Respiratory Care, WV Board of**  
*Student Temporary Permits*  
30CSR9
- f. **Social Work Examiners, WV Board of**  
*Fee Schedule*  
25CSR3
- g. **Medicine, West Virginia Board of**  
*Establishment and Regulation of Restricted License Issued to  
an Applicant in Extraordinary Circumstances*  
11CSR2
- h. **Physical Therapy, West Virginia Board of**  
*General Provision*  
16CSR1
- i. **Deaf and Hard of Hearing, WV Commission for the**  
*Establishment of Required Qualifications and Ethical  
Standards for Interpreters and Translitterators*  
192CSR3
- j. **Office of Waste Management, DEP**  
*Hazardous Waste Management System*  
33CSR20

**TENTATIVE AGENDA**  
**LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**  
Tuesday, October 14, 2008  
3:00 p.m. to 5:00 p.m.  
Senate Judiciary Committee Room

**1. Review of Legislative Rules:**

- a. **Agriculture, WV Department of**  
*Animal Disease Control*  
61CSR1
  - Approve as Modified
- b. **Health and Human Resources, WV Department of**  
*Public Water Systems*  
64CSR3
  - Approve as Modified
- c. **Health and Human Resources, WV Department of**  
*Tuberculosis Testing, Control, Treatment and Commitment*  
64CSR76
  - Approve as Modified
- d. **Motor Vehicles, Division of**  
*Collection on the Tax on the Sale of a Vehicle*  
91CSR9
  - Approve as Modified
- e. **Respiratory Care, WV Board of**  
*Student Temporary Permits*  
30CSR9
  - Approve as Modified
- f. **Social Work Examiners, WV Board of**  
*Fee Schedule*  
25CSR3
  - Approve
- g. **Medicine, West Virginia Board of**  
*Establishment and Regulation of Restricted License Issued to  
an Applicant in Extraordinary Circumstances*  
11CSR2
  - Approve as Modified

- h. **Physical Therapy, West Virginia Board of  
General Provision  
16CSR1**
  - Approve as Modified
- i. **Deaf and Hard of Hearing, WV Commission for the  
Establishment of Required Qualifications and Ethical  
Standards for Interpreters and Transliterators  
192CSR3**
  - Approve as Modified
- j. **Office of Waste Management, DEP  
Hazardous Waste Management System  
33CSR20**
  - Approve as Modified
- k. **Division of Water and Waste Management, DEP  
Assessment of Civil Administrative Penalties  
33CSR22**
  - Approve as Modified
- l. **Division of Water and Waste Management, DEP  
Hazardous Waste Management Fee  
33CSR24**
  - Approve as Modified
- m. **Division of Water and Waste Management, DEP  
Assessment of Civil Administrative Penalties  
47CSR56**
  - Approve as Modified
- n. **Ethics Commission, WV  
Purchase, Sale or Lease of Personal Property  
158CSR3**
  - Approve as Modified
- o. **Ethics Commission, WV  
Interest in Public Contracts  
158CSR8**
  - Approve as Modified
- p. **Ethics Commission, WV  
Employment Exemptions  
158CSR11**
  - Approve

q. **Ethics Commission, WV**  
*Filing of Verified Time Records*  
158CSR14

- Approve

r. **Administration, Department of - Purchasing Division**  
*Purchasing*  
148CSR1

- Approve

s. **Administration, Department of**  
*Parking*  
148CSR6

- Approve as Modified

2. **Other Business**

OCTOBER INTERIM ATTENDANCE

Legislative Interim Meetings

October 12, 13 & 14, 2008

Tuesday, October 14, 2008

3:00 p.m. - 5:00 p.m.

Legislative Rule-Making Review Committee

Earl Ray Tomblin, ex  
officio nonvoting member

Richard Thompson, ex  
officio nonvoting member

Senate

House

Minard, Chair ✓  
Fanning, Vice Chair ✓  
Prezioso ✓  
Unger ✓  
Boley ✓  
Facemyer ✓

Brown, Chair ✓  
Miley, Vice Chair ✓  
Burdiss ✓  
Talbot ✓  
Overington ✓  
Sobonya ✓

Meeting called to order by Brown

Approval of minutes - October 12, 2008

- Agriculture 61CSR1

Debra explained  
Minard moved as modified  
Approved as modified

- Health 64CSR3

Debra explained & responded to ?'s  
Ann Spence w/ Bureau responded to ?'s  
Minard moved rule as modified  
Approved as modified

● - Health 64CSR76  
Debra explained  
Minard moved rule as modified  
Approved as modified

- Motor Vehicles 91CSR9  
Debra explained & responded to ?'s  
Steve Dale w/ DMV responded to ?'s  
Minard moved rule as modified  
Approved as modified

● - Respiratory 30CSR9  
Charlie explained  
Minard moved rule as modified  
Approved as modified

- Social Work 25CSR3  
Charlie explained  
Judith Williams responded to ?'s  
Minard moved rule  
Approved

● - Medicine 11CSR2  
Charlie explained & responded to ?'s  
Debra Rodecker, Counsel for Board,  
responded to ?'s  
Minard moved rule as modified  
Approved as modified



● - Physical Therapy 16CSR1  
Charlie explained & responded to ?'s  
Minard moved rule as modified  
Approved as modified

- Deaf & Hard of Hearing 192CSR3  
Charlie explained ~~000~~  
Roy Forman, Interim Director, w/ Commission  
responded to ?'s  
Minard moved rule as modified  
Approved as modified

● - Waste 33CSR20  
Jay explained  
Minard moved rule as modified  
Approved as modified

- Waste & Water 33CSR22  
Jay explained  
Ray Frank, general Counsel. w/DEP, responded  
to ?'s  
~~Minard moved rule as modified~~  
Sobonya moved to lay over  
Approved lay over

● - Water and Waste 33CSR24  
Jay explained & responded to ?'s  
Terrell Sangid, Assist Dir of Water & Waste Man responded to ?'s  
Ray Frank responded to ?'s  
Minard moved rule as modified  
Approved as modified

- Water and Waste 47CSR56  
Jay explained  
Minard moved to lay over  
Approved

● - Minard moved to adjourn  
Adjourned

**TENTATIVE AGENDA**  
**LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**  
**Tuesday, October 14, 2008**  
**3:00 p.m. to 5:00 p.m.**  
**Senate Judiciary Committee Room**

**1. Review of Legislative Rules:**

*Approved  
as modified*

**Agriculture, WV Department of  
Animal Disease Control  
61CSR1**

- Approve as Modified

*Approved  
as modified*

**Health and Human Resources, WV Department of  
Public Water Systems  
64CSR3**

- Approve as Modified

*Approved  
as modified*

**Health and Human Resources, WV Department of  
Tuberculosis Testing, Control, Treatment and Commitment  
64CSR76**

- Approve as Modified

*Approved  
as modified*

**Motor Vehicles, Division of  
Collection on the Tax on the Sale of a Vehicle  
91CSR9**

- Approve as Modified

*Approved  
as modified*

**Respiratory Care, WV Board of  
Student Temporary Permits  
30CSR9**

- Approve as Modified

*Approved*

**Social Work Examiners, WV Board of  
Fee Schedule  
25CSR3**

- Approve

*Approved  
as modified*

**Medicine, West Virginia Board of  
Establishment and Regulation of Restricted License Issued to  
an Applicant in Extraordinary Circumstances  
11CSR2**

- Approve as Modified

q. **Ethics Commission, WV**  
*Filing of Verified Time Records*  
158CSR14

- Approve

r. **Administration, Department of - Purchasing Division**  
*Purchasing*  
148CSR1

- Approve

s. **Administration, Department of**  
*Parking*  
148CSR6

- Approve as Modified

2. **Other Business**

REGISTRATION OF PUBLIC  
AT COMMITTEE MEETINGS

WEST VIRGINIA LEGISLATURE

Committee: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

Date: Oct. 14, 2008

Please print or write plainly.

| NAME                                | ADDRESS                                      | REPRESENTING           | RULE NUMBER | Please mark with an (X) if you desire to make a statement |
|-------------------------------------|--|------------------------|-------------|---|
| <del>Jack Starcher</del>            | WV D ag                                      | Same                   | 61          |   |
| <del>Lubith Williams</del>          | Bldg 1 - Room W169                           | Social Work Board<br>← | 25CSR3      |   |
| Lesleigh Barber<br>Sprouse, PT, DPT | WV - Board of Physical<br>Therapy (Chairman) | WV PT Board            | 16 CSR 1    |   |
|                                     |  |                        |             |   |
|                                     |  |                        |             |   |

handout  
10/14/08



# WEST VIRGINIA MANUFACTURERS ASSOCIATION

2001 Quarrier Street, Charleston, WV 25311  
Telephone: (304) 342-2123  
FAX: (304) 342-4552  
wvma@wvma.com

October 14, 2008

The Honorable Joe Minard  
WV Senate  
510 Haymond Highway  
Clarksburg, WV 26301

The Honorable Bonnie Brown  
WV House of Delegates  
2328 Woodland Avenue  
South Charleston, WV 25303

*Re: Comments of the WVMA Concerning West Virginia DEP's Agency-Approved Proposed Rules Concerning the Assessment of Civil Administrative Penalties for Solid and Hazardous Waste (33 CSR 22) and the Hazardous Waste Management Fee (33 CSR 24).*

Dear Senator Minard and Delegate Brown:

The West Virginia Manufacturers Association ("WVMA") represents numerous manufacturers throughout West Virginia subject to the above-referenced agency-approved proposed rules. 33 CSR 22 (Assessment of Civil Administrative Penalties for Solid and Hazardous Waste) was proposed on July 7, 2008. 33 CSR 24 (Hazardous Waste Management Fee) was proposed on July 8, 2008. The WVMA submitted written comments on each of these proposed rules on August 14, 2008 and August 12, 2008 respectively. See attached Exhibit A. In its response to comments on both rules filed with the Secretary of State on August 26, 2008 and August 28, 2008, respectively. The DEP failed to adequately address the concerns raised by the WVMA comments. Therefore, by copy of this letter, the WVMA wishes to respectfully advise the Legislative Rule-making Review Committee of its continuing concerns regarding these two rules.

Please contact me if you have additional questions.

Sincerely,

Karen S. Price  
President

c: Jay Lazelle, Esquire

Board of Directors

|                                  |                                      |                             |                                |                                      |
|----------------------------------|--------------------------------------|-----------------------------|--------------------------------|--------------------------------------|
| Alliant Techsystems, Inc.        | Camtura Corporation                  | Georgia-Pacific Corporation | NGK Spark Plugs (U.S.A.), Inc. | Putnam County Development Authority  |
| Allied Processing Services, Inc. | Criterion Catalysts Technologies, LP | Haltown Paperboard          | Phillips Machine Service, Inc. | REIC Laboratory                      |
| Alpharma Inc.                    | Dow Chemical Company                 | Kanawha Manufacturing Co.   | Pilgrim's Pride Corporation    | Toyote Motor Manufacturing, WV, inc. |
| Armstrong World Industries       | DuPont                               | Kingsford Manufacturing Co. | Pioneer Pipe                   | U.S. Silica Company                  |
| Bayer CropScience                | Eagle Manufacturing Company          | Marathon Domestic LLC       | PPG Industries, inc.           | Wheeling-Nisshin, Inc.               |
| Bayer MaterialScience, LLC       | Esroc                                | Marie King, Inc.            |                                |                                      |



**ROBERT E. LANNAN**  
**ATTORNEY AT LAW**

P.O. BOX 1791  
CHARLESTON, WV 25326

DIRECT DIAL: (304) 347-8346  
E-MAIL: [rel@ramlaw.com](mailto:rel@ramlaw.com)

August 12, 2008

VIA HAND DELIVERY

Ms. Kathy Cosco  
Communications Director  
Department of Environmental Protection  
601.57<sup>th</sup> Street SE  
Charleston, WV 25304

**RECEIVED**

**AUG 12 2008**

DEPARTMENT OF ENVIRONMENTAL PROTECTION

08-12-08P02:33 RCVD

Dear Ms. Cosco:

Please find enclosed for filing the original Comments of the West Virginia Manufacturers Association on the West Virginia Department of Environmental Protection, Division of Water and Waste Management's 2008 Proposed Rule Regarding the Hazardous Waste Management Fee (33 CSR 24).

Very truly yours,

Robert E. Lannan

REL:dlm  
Enclosure

400 FIFTH THIRD CENTER • 700 VIRGINIA STREET, EAST • CHARLESTON, WV 25301 • (304) 344-5800  
140 WEST MAIN STREET • SUITE 300 • CLARKSBURG, WV 26302 • (304) 622-5022  
[www.ramlaw.com](http://www.ramlaw.com)

ROBINSON & McELWEE, PLLC IS A MEMBER OF ALFA INTERNATIONAL

{R0332185.1}

**COMMENTS OF THE WEST VIRGINIA MANUFACTURERS  
ASSOCIATION ON THE WEST VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, DIVISION OF  
WATER AND WASTE MANAGEMENT'S 2008 PROPOSED RULE  
REGARDING THE HAZARDOUS WASTE MANAGEMENT FEE (33 CSR 24)**

The West Virginia Manufacturers Association ("WVMA") represents numerous manufacturing entities throughout the State which are subject to the regulations of the West Virginia Department of Environmental Protection, Division of Water and Waste Management. The WVMA submits the following comments on DEP's proposed revisions to the hazardous waste management fee rule, 33 CSR 24. The so-called "certification fee" was originally enacted into the State hazardous waste management program in 2002. (W.Va. Code § 22-18-22(b) *et seq.*; 33 CSR 24). The WVMA was one of several trade organizations cooperatively working with DEP representatives to address a short-term funding need of the State in order to, as the WVMA and others were informed at that time by DEP, maintain delegation of the State RCRA program and meet the matching requirements for certain federal EPA grants in the hazardous waste management area. Subsequently, rules were negotiated through a cooperative process between a number of affected trade associations and DEP representatives, which created a regulatory framework for calculating and billing the fee. These rules went into effect in April 2003. During this time period, it was always the understanding of the WVMA and its members that the certification fee was to be imposed for a limited time and a specific purpose.

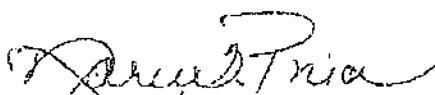
Subsequent actions of DEP in later years have indicated its intention otherwise, however. In 2006 and again in 2008, DEP has twice sought to legislatively continue the fund beyond its sunset provision and now it proposes to increase the fees charged to



entities regulated under the hazardous waste management program. While the WVMA supports having a federally delegated RCRA program in the State of West Virginia, we oppose the fee increases proposed in the rule and we will continue to oppose without further justification from DEP any extension to the certification fee program by either statute or regulation. The certification fee is nothing more than a tax and its impact falls disproportionately on our members. The benefits of the State hazardous waste management program inure to all the citizens of West Virginia and DEP must start looking now at different ways of obtaining funding and other streams of revenue, such as the general revenue fund, to maintain a viable hazardous waste management program which now appears to be primarily, if not totally, funded by the regulated community.

We additionally oppose DEP's proposed removal of the provision which prohibits DEP from collecting the certification fee from facilities which have made a payment for that year into the Hazardous Waste Emergency Response Fund created by Chapter 22, Article 19 of the Code. See Proposed §4.3.b. No justification has been given by DEP for the removal of this provision which was agreed to by all parties at the time the original rule was negotiated in 2002. The WVMA appreciates the opportunity to provide comments on the proposed rule and hopes that the DEP seriously consider the suggestions and comments made herein.

Respectfully submitted,



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Karen S. Price  
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West Virginia Manufacturers Association  
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Charleston, West Virginia 25311



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August 14, 2008

VIA HAND DELIVERY

Ms. Kathy Cosco  
Communications Director  
Department of Environmental Protection  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304

**RECEIVED**

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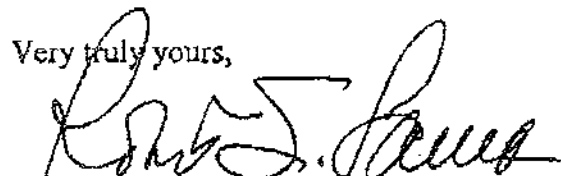
DEPARTMENT OF ENVIRONMENTAL PROTECTION

08-14-08P02:13 RCVD

Dear Ms. Cosco:

Please find enclosed for filing the original Comments of the West Virginia Manufacturers Association on the West Virginia Department of Environmental Protection, Division of Water and Waste Management's Proposed Rule on Assessment of Civil Administrative Penalties for Solid and Hazardous Waste (33 CSR 22).

Very truly yours,



Robert E. Lannan

REL:dln  
Enclosure

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**COMMENTS OF  
THE WEST VIRGINIA MANUFACTURERS ASSOCIATION  
ON THE WEST VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, DIVISION OF  
WATER AND WASTE MANAGEMENT'S PROPOSED  
RULE ON ASSESSMENT OF CIVIL ADMINISTRATIVE  
PENALTIES FOR SOLID AND HAZARDOUS WASTE (33 CSR 22)**

The West Virginia Manufacturers Association ("WVMA") represents numerous manufacturers throughout the State of West Virginia subject to potential regulation by the West Virginia Department of Environmental Protection, Division of Water and Waste Management ("DWWM") in the assessment of civil administrative penalties for violations of the Hazardous Waste Management Act, W.Va. Code §22-18-1 et seq; 33 CSR 22. On this basis, the WVMA submits the following comments on DWWM's proposed revisions to these regulations.

I. **Proposed Section 5.3.D. Ability to Pay.**

Proposed Section 5.3.D. provides as follows:

During the course of the informal hearing, a violator may make a request to have its ability to pay a civil administrative penalty evaluated. Such a request will only be evaluated if the violator provides all required information and it is received by the Assessment Officer within ten (10) calendar days of the informal hearing date. Incomplete information or information received more than ten (10) days after the informal hearing date will not be evaluated. Should completed information be received in a timely fashion, it will be evaluated in accordance with the United States Environmental Protection Agency (US EPA) Guidance.

The WVMA objects to the attempt by DEP to formally codify an "ability to pay" factor in the proposed regulations. Historically, DEP has handled such issues on a case-by-case basis using guidance found in the federal EPA's RCRA Civil Penalty Policy (June 2003). Under that policy, the violator can raise its inability to pay after the penalty has been assessed. The WVMA

is concerned that formal codification of an ability to pay "defense" sends the wrong message to members of the regulated community who are not financially viable because, in the end analysis, DEP will treat them in a more favorable fashion than members of the regulated community which have the ability to comply (and pay for) violations of the State hazardous waste management program. Those who may have such a defense in fact may very well have a disincentive to comply with the regulatory program if they know they will be treated favorably because of financial considerations. The net effect is to shift more of the economic penalty costs to financially viable manufacturers simply because they can pay. We would therefore urge the DEP to not adopt the proposed language.

## II. Section 7.4. "Unique Factors."

Proposed Section 7.4 adds a new dynamic to the DEP civil administrative penalty calculation procedures heretofore utilized for hazardous waste violations. It specifically provides that:

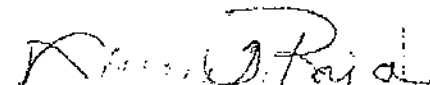
Should the violation in question involve an actual release to the environment or harm to human health or involve a chemical that is persistent or bioaccumulative, the associated civil administrative penalty may be multiplied by a factor of up to 2.0. (emphasis added).

The proposed addition to specifically address PBT chemicals must be viewed in light of the long established methodology set forth in the federal RCRA civil administrative penalty policy which DEP has previously attempted to follow. The federal RCRA civil administrative penalty calculation procedures involve taking into consideration two components in arriving at the seriousness of the penalty assessed. These two components include the potential for harm

and extent of deviation from a statutory or regulatory requirement. The DEP's proposal is attempting to "double dip," by adding into the equation, as another entirely separate component, a "Unique Factors" penalty, when, in fact, the harmful nature of a released waste may already be taken into account through the "Potential for Harm" component of the federal policy on which the State rules are currently based. Nowhere in the federal RCRA Civil Penalty Policy is there any mention of adding an additional penalty factor for certain constituents, including persistent and bioaccumulative chemicals. Legislative policy codified in the State Hazardous Waste Management Act clearly provides that the State program should be "consistent with" and "equivalent to" the federal program. W.Va. Code §22-3-23. Obviously, this is not the case where the State appears to be deviating from the federal program in proposing to draw an unwarranted distinction with regard to different classes of chemicals. We would therefore urge the DEP not to adopt Section 7.4 as proposed.

The WVMA does not favor the above two proposed DEP additions to the State civil administrative penalty regulations for hazardous waste. We would request that these two proposals not be adopted by the DEP. The WVMA appreciates the opportunity to provide comments on the proposed rule and trusts that DEP will seriously consider the suggestions and comments contained herein.

Respectfully submitted,



Karen S. Price  
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